90-959

No.

IN THE

Supreme Court of the United States

October Term 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY,

Petitioners

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a representative of rail carrier employees having an interest in employee job protection, has standing to petition for review of Interstate Commerce Commission orders upholding the validity of a rail line acquisition and a rail line abandonment.

2. Whether rail shippers have standing to seek judicial review of an Interstate Commerce Commission order upholding the validity of a rail line abandonment where overturning the ICC order will not in itself restore train service over the line.

LIST OF PARTIES

The parties are listed in the caption. There are no parents or subsidiaries of petitioner corporations. Rule 29.1.

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INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Patrick W. Simmons,[1] McLay Grain Company, and Edenfruit Products Company,[2] respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in the proceedings on April 16, 1990, and August 2, 1990.[3]

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[1]Illinois Legislative Director for United Transportation Union.

[2]McLay Grain Company and Edenfruit Products Company, are two railroad shippers located at Poplar Grove, IL, each with a siding served by respondent Chicago & North Western Transportation Company.

[3]This petition for writ of certiorari embraces two cases that involve closely related questions, and were decided simultaneously by the court below. Rule 12.2.

OPINIONS BELOW

The opinions of the court of appeals are reprinted in the Appendix at App. B. The opinions, including that on petition for rehearing, in the first case (Harvard-Chemung) (*Acquisition*) are set forth (App. B, 3a-17a) and reported at 900 F. 2d 186;[4] the opinion in the second case (Chemung-Poplar Grove (*Abandonment*) is set forth (App. B, 18a-26a) and reported at 900 F.2d 1023.

The decisions of the Interstate Commerce Commission are set forth (App. D, 29a-73a) and are unreported.

JURISDICTION

The judgments of the courts of appeals in both cases were entered April 16, 1990. Timely petitions for rehearing in both cases were denied on August 2, 1990. (App. B, 12a-13a; App. E, 74a).

The petitioners' time within which to file this petition was extended to November 30, 1990, and further extended to December 14, 1990, by orders of Mr. Justice Stevens dated October 20 and November 20, 1990. (App. A, 1a-2a).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). *See also:* 28 U.S.C. 2101(c), 2350(a).

STATUTES INVOLVED

The statutes primarily involved are 49 U.S.C. 10101a, 10328(a), 10505(a) & (g), 10901(e), 10903(b)(2), 11344(b)(1) and 11347, and are set forth in the Appendix (App. F, 75a-79a).

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[4]Supersedes opinion reported at 900 F.2d 1018.

STATEMENT OF THE CASE

The court of appeals ruled that a railroad labor union lacks standing to challenge orders of theInterstate Commerce Commission (ICC) issued under the Interstate Commerce Act, 49 U.S.C. 10101, *et seq.*, involving the acquisition by a newly-formed non-carrier, Chicago-Chemung Railroad Corporation (CCRC), of a 3.5-mile rail segment owned and operated by Chicago and North Western Transportation Company (C&NW) between Harvard and Chemung, IL. 909 F.2d at 190 (App. B, 10a); and the court of appeals likewise found the union lacked standing with respect to the abandonment of an adjoining 6.5-mile segment between Chemung and Poplar Grove, IL. 900 F.2d at 1026. The court below also ruled in the abandonment case that shippers lacked standing to challenge the abandonment because the Chemung-Poplar Grove line segment is inoperable due to a derailment, so that reversal of the ICC's abandonment decision would not address the shippers' alleged injury. 900 F.2d at 1026 (App. B, 24a).

Judge Cudahy, joined by Judge Ripple, filed a vigorous dissent on petition for rehearing en banc, in the *Acquisition* case, 909 F.2d at 193 (App. B, 17a):

> This case presents a very difficult and important question — one which deserves the consideration of the entire court.

1. *Background.* C&NW for a number of years has attempted to abandon its 23.4-mile line between Harvard and So. Beloit, IL. On two occasions, in 1981 and in 1987, its applications for abandonment drew substantial protest, causing C&NW to withdraw its applications. However, rather than file a third application for abandonment, C&NW instituted a series of transactions to trifurcate the line into three segments. These efforts were (1) transfer of the eastern 3.5-mile Harvard-

Chemung segment for acquisition and operation by CCRC; (2) use of the out-of-service class abandonment exemption for the summary abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 13.4-mile Poplar Grove-Beloit segment. 909 F.2d at 187-88 (App. B, 4a-5a); 900 F.2d at 1024 (App. B, 19a).

The resulting *Acquisition* and *Abandonment* proceedings at the ICC, and then in the court below, involve the eastern Harvard-Chemung segment and the middle Chemung-Poplar Grove segment. C&NW thus far has not filed for abandonment of the western Poplar Grove-So. Beloit segment.

2. *The ICC's Acquisition Case.* CCRC is closely affiliated with Seegers Grain, Inc. (Seegers), the latter having grain facilities proximate to Chemung, and which could be connected to the Harvard-Chemung line. (App. B, 41a, 45a-46a). C&NW and CCRC entered into an agreement for CCRC to acquire C&NW's 3.5-mile Harvard-Chemung segment by means of the class exemption for line acquisitions, which permits a non-carrier to acquire a line on 7-days notice. 49 CFR 1150.31-.35. *See: Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901,* 1 I.C.C.2d 810 (1985), *aff'd Illinois Commerce Com'n v. ICC,* 817 F.2d 145 (D.C. Cir. 1987).[5]

The United Transportation Union (UTU), through its Illinois Legislative Director, Patrick W. Simmons, sought a stay of the acquisition, which was denied by the ICC. Finance Docket No. 31110, *Chicago-Chemung Railroad Corporation-Exemption, Acquisition and Operation-Rail Line of Chicago and*

[5]The required notice period has been expanded for larger acquisitions which would create a Class II or Class I rail carrier. *See: Ibid.*, 4 I.C.C.2d 309 and 4 I.C.C.2d 822 (1988).

North Western Transportation Company Between Harvard and Chemung in McHenry County, IL (Sept. 29, 1987).[6]

UTU, joined by statements from Dean Foods Company, a shipper on the Harvard-Chemung segment, and by statments from McLay Grain Company (McLay) and Edenfruit Products (Edenfruit), shippers on the Poplar Grove-Sc. Beloit segment, petitioned to revoke the exemption. A number of objections to the CCRC acquisition were raised, including the competitive relations between grain shippers which would result from Seegers' control of CCRC, and the so-called "commodities clause," 49 U.S.C. 10746; the viability of CCRC as a substitute for C&NW; and the impact upon C&NW shippers at Poplar Grove in defending against C&NW's anticipated abandonment request for the western Poplar Grove-So. Beloit segment; and restoration of the damaged Chemung-Poplar Grove segment.

The ICC on March 14, 1988 denied the petition to revoke the acquisition exemption (App. D, 35a-47a), and the ICC on September 12, 1988, denied reopening. (App. D, 48a-55a).

3. *The ICC's Abandonment Case.* Some two weeks after the ICC denied the request to reopen its decision in the *Acquisition* case, C&NW on September 26, 1988 filed its notice for automatic abandonment of the middle Chemung-Poplar Grove segment. C&NW's notice was filed under the class abandonment exemption for so-called "out-of-service" lines. 49 CFR 1152.50 *See: Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C.2d 55 (1984), *rem. Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986); *Exemption of Out of Service Rail Lines*, 2 I.C.C. 2d 146 (1986), *aff'd Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. den.* 109 S. Ct. 783.

[6]The ICC's reference to the date of its decisions is by the "service" date, whereas the court of appeals often uses the "decided" date. References in this petition are to the court's date for the ICC decisions.

An "out-of-service" line does not mean that traffic is not handled on the line segment, but only that no traffic originated or terminated on the line segment. The exemption requires only that no such local traffic has moved for at least two years, and any overhead traffic can be rerouted over other lines, and that no user of rail service has complained. 900 F.2d at 1024 (App. B, 20a).

McLay, Edenfruit, and UTU petitioned for stay of the abandonment on the ground that abandonment of the Chemung-Poplar Grove segment would prejudice the ultimate disposition of the Harvard-Chemung acquisition proceeding, and the forthcoming abandonment of the Poplar Grove-So. Beloit segment, and constitutes an abuse of the exemption provisions. The ICC on November 10, 1988 denied the stay request by a divided 3-to-1 vote, with a dissenting expression. Docket No. AB-1 (Sub-No. 221X), *Chicago and North Western Transportation Company-Abandonment Exemption-Boone County, IL* (App. D, 56a-62a). The majority stated it was unclear how the shippers would be prejudiced in the Harvard-Chemung case or in the forthcoming Poplar Grove-So. Beloit case. The dissenting commissioner stated the Poplar Grove shippers face impending abandonment of the circuitous service they now receive. 900 F.2d at 1025 (App. B, 21a); App. D, 56a-62a.

The ICC on May 8, 1989 denied the McLay-Edenfruit-UTU petition to revoke the abandonment exemption, by a divided 3-to-2 vote. The majority concluded that even if C&NW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the Chemung-Poplar Grove operation. 900 F.2d at 1025 (App. B, 21a-22a); App. D, 63a-73a.[7] The separate dissenting expressions of the

[7]This finding of no C&NW incentive to repair the derailment is in marked contrast with the ICC's earlier finding to the contrary, "There is nothing of record to suggest that CNW will not repair the track disruption." (*Acquisition*, App. D, 31a).

two commissioners highlighted the apparent purpose of C&NW to abandon the entire remaining line. (App. D, 72a-73a).

4. *The Court of Appeals Decisions.* Although the petitions to review the ICC's *Acquisition* and *Abandonment* decisions were briefed separately in the court of appeals, both cases were argued the same day before the same panel. During the briefing, no question was raised concerning the standing of any petitioner in the *Abandonment* case; however, in the *Acquisition* case, respondent ICC challenged the standing of UTU insofar as UTU contested the ICC's decision on the "commodities clause" (49 U.S.C. 10746) claim. However, the ICC's counsel did not contend that UTU lacked standing to raise other claims. The statement by the court of appeals that the ICC challenged UTU's standing to petition for review, 909 F.2d at 189 (App. B, 7a), is incorrect.

The two cases were argued December 14, 1989. On November 28, 1989, a panel of the court of appeals for the D.C. Circuit decided *United Transp. Union v. ICC*, 891 F.2d 908 (D.C. Cir. 1989) *cert. den.* 110 S.Ct. 3271[8] holding that UTU in that case lacked the requisite injury under Article III of the Constitution to challenge the ICC's exemption of interlocking directorates from 49 U.S.C. 11322(a). McLay, a party to the ICC's *Acquisition* case, then moved to intervene and to adopt UTU's brief, but was opposed by the ICC, and the court of appeals on December 13, 1989 denied McLay's intervention as untimely. (App. C, 27a).

A. *Acquisition Decision.* The court of appeals in No. 88-3207 reviewing the ICC's *Acquisition* rulings, on April 16, 1990 concluded that petitioner Simmons (UTU) lacked standing to

[8]Cf *Broth. of Ry. Carmen (Div. of UTU) v. ICC*, 917 F.2d 1136 (8th Cir. 1990).

challenge the ICC's order, and dismissed the petition for review. 909 F.2d at 186 (App. B, 3a-11-a).[9] The court of appeals held that an anticipated job loss to UTU members upon transfer of the Harvard-Chemung line from C&NW to CCRC met the U.S. Constitution Article III requirement for standing, for UTU members would be injured, but that the prudential requirement with its "zone of interest" consideration was another matter. 909 F.2d at 189 (App. B, 8a):

> Simmons alleges that members of the UTU will lose their jobs due to sale of the line. This injury satisfies all three prongs of the Article III standing requirement. However, Simmons must also satisfy prudential limitations on standing."

The court of appeals held that UTU did not meet the prudential test because employee job protection is not within the "zone of interests" to be protected by the Interstate Commerce Act. 909 F.2d at 190 (App. B, 10a).

The court of appeals, relying principally upon *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), stated the presumption in favor of judicial review of agency action is overcome whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme. 909 F.2d at 189-90 (App. B, 8a-9a). Here, the court below found that the interest of rail employees in job protection is not within the "zone of interests" under the Interstate Commerce Act, 49 U.S.C. 10101, *et seq.* The court looked to the rail transportation policy, 49 U.S.C. 10101a, and noted that it was mainly directed to maintaining a safe and competitive

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[9]Although denying standing, the court of appeals stated any future review actions by Patrick W. Simmons should be brought in the name of UTU, rather than following the practice of naming the individual UTU official directly involved and responsible under the organization's constitution. 909 F.2d at 187 n.1 (App. B, 3a-4a n.1).

rail system, and that the only provision specifically dealing with rail employees was contained in subsection 12 dealing with fair wages and safe and suitable working conditions, not job retention. 900 F.2d at 190 (App. B, 10a):

> The issue in this case is whether the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, was enacted to protect the zone of interests asserted in this case; i.e., the interest of rail employees in retaining their jobs. 49 U.S.C. § 10505(g) states that "the Commission may not exercise its authority [to exempt transactions] under this section . . . to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle [the Interstate Commerce Act]." Section 10505(a) specifically refers to §10101(a), which lists the overall interests which the Interstate Commerce Act seeks to protect through its rail transportation policy. The policy mainly concentrates on maintaining a safe and competitive railroad system. In contrast to other provisions of the Act, the only stated interest specifically applicable to rail employees is contained at subsection 12: "To encourage fair wages and safe and suitable working conditions in the railroad industry . . . ." The pertinent provisions of the Interstate Commerce Act clearly are not intended to protect a rail employee's interest in retaining his job. Therefore the Act's zone of interests does not encompass the only UTU members' interest which Simmons alleges the ICC's action threatens. Simmons has no standing to petition for review under *Clarke*.

Finally, responding to whether UTU in attacking the ICC's *Acquisition* decision could raise "public interest" arguments

affecting the interests of others — a matter addressed to the court by both UTU and ICC — the court of appeals ruled that once a person has standing, he may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate;[10] but since UTU has not established its own standing, it cannot have standing as a representative of the public interest. 909 F.2d at 190 (App. B, 10a-11a).

B. *Dissent by Judges Cudahy & Ripple.* UTU's petitions for rehearing, with suggestion for rehearing *en banc*, were denied on August 2, 1990, 909 F.2d at 191 (App. B, 12a-13a; App.E, 74a). Judge Cudahy, joined by Judge Ripple, dissented from the denial of rehearing *en banc* in the *Acquisition* case. 909 F.2d at 191-93 (App. B, 13a-17a).

Judge Cudahy observed the decision is of exceptional importance and is the first known instance where standing has been denied to railroad labor in a proceeding in which job eliminaton is a consideration, and he noted there have been many *thousands* of administrative proceedings and appeals to the courts involving line abandonments, mergers, line sales and the like in which employee representatives have participated without question in both the agency and in court. To assert that job protection lies outside the "zone of interests" arguably protected by the Interstate Commerce Act is to ignore history, even if the principial mode of protection is the imposition of conditions. 909 F.2d at 191 (App. B, 13a-14a):

> To assert that job protection lies outside the "zone of interests" arguably protected by the ICA seems to me to ignore the history of railroad regulation for most of the twentieth century. The ICA certainly

[10]Citing, *Comminssion v. Sanders Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio v. Comm'n*, 316 U.S. 4 (1942); *Sierra Club v. Morton*, 415 U.S. 727 (1972).

> recognizes loss of jobs as a crucial problem, even if the principal mode of "protection" is the imposition of conditions of compensation.

The dissent cited the absolute right of railroad representatives to intervene in any proceeding arising under the Interstate Commerce Act (49 U.S.C. Subtitle IV) by means of 49 U.S.C. 10328(a), and the decisions of the Court in *Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519 (1947) and in *American Trucking Assns v. U.S.*, 355 U.S. 141, 144 (1957). 909 F.2d 191-92 (App. B, 14a-15a).

Judge Cudahy stated that the Interstate Commerce Act makes specific provision for the protection of railroad workers in a number of the restructuring schemes, and that it seems implausible that Congress would guarantee employees a role in ICC and in court proceedings, but deny them standing to appeal from one to the other. 909 F.2d at 192 (App. B, 15a-16a):

> As I have indicated, the ICA in fact makes specific provision for the protection of railroad workers in a number of railroad restructuring schemes. Further, rail labor's statutory right of intervention alone ought to indicate that employees' interests are not "marginally related to or inconsistent with the purposes implicit in" the Interstate Commerce Act. *Clarke*, 479 U.S. at 399. The whole court ought to weigh the apparently implausible proposition that Congress would by statute guarantee employees a role in ICC proceedings and in the courts, but, without any express provision to that effect, intend to deny them standing to appeal from one to the other.

The dissent concluded with reference to the unanimous Court in *United States v. Lowden*, 308 U.S. 225, 234, 235-39

(1939) that the just and reasonable treatment of rail employees is not only an essential aid to the maintenance of service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

C. *Abandonment Decision*. The court of appeals in its Nos. 88-3211 & 89-1961, reviewing the ICC's *Abandonment* decision, on April 16, 1990 concluded that none of the petitioners — UTU, McLay, or Edenfruit — has standing to challenge the ICC's abandonment exemption for the middle Chemung-Poplar Grove line segment, and dismissed their petitions for review. 900 F.2d 1023 (App. B, 18a-26a). The Court below referred to the companion *Acquisition* decision, and said labor's concern for job losses satisfied the injury requirement for Article III standing, but that such injury is not within the zone of interests protected by the Interstate Commerce Act. 900 F.2d at 1027. (App. B, 25a-26a).

The court of appeals found that the shippers lacked standing because they did not provide evidence or allege that C&NW would likely repair the derailment in the event the abandonment were denied. C&NW has been serving the Poplar Grove shippers by a circuitous route through Beloit, WI to Harvard, IL, which could continue if the abandonment of the Chemung-Poplar Grove were denied. Accordingly, the court of appeals found the shippers do not satisfy the test for standing that the injury is likely to be redressed through a favorable decision against the ICC. 900 F.2d at 1026. (App. B, 24a). The court of appeals added that the petitoners had not alleged environmental damage -- only that the ICC did not follow proper administrative procedures — and such is insufficient to establish standing. 900 F.2d at 1027. (App. B, 25a).

REASONS FOR GRANTING THE WRIT

The court of appeals in denying standing for rail employee organizations to challenge ICC orders involving line sales and abandonments has reversed over 40 years of unbroken precedent.

This is the first known instance in a very long history of employee participation where standing has been denied to railroad labor in proceedings in which job elimination is a consideration, as the dissent recognized. 909 F.2d at 191 (App. B, 13a). The injury-in-fact requirement of the U.S. Constitution, Article III, is satisfied, yet the court of appeals holds that UTU fails the "prudential" test because, in its view, Congress did not intend employee job protection to be within the "zone of interests" covered by the Interstate Commerce Act, U.S.C. 10101, *et seq.*

The implications of the decisions below are appalling. If rail labor cannot challenge ICC decisions involving spin-off of lines by major railroads to newly-formed carriers, and cannot challenge ICC abandonment decisions, then rail labor must seek relief elsewhere. Further, the court of appeals also has denied standing for shippers to challenge a line of abandonment which threatens continuance of service to them.

The court of appeals' mistaken holding ignores the history of railroad regulation for most of the twentieth century.

I. THE DECISION OF THE COURT OF APPEALS IN THE *ACQUISITION* CASE CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE PRACTICE OF LOWER COURTS FOR DECADES.

1. It has been settled for over 40 years that representatives of railroad employees have an absolute right to be heard in any proceeding under the Interstate Commerce Act that affects the employees. The statute, formerly 49 U.S.C. 17(11), and recodified to its present 49 U.S.C. 10328(a), reads (App. F, 77a).

> Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.

This absolute right to participation was confirmed by this Court in *Railroad Trainmen* v. *B. & O. R. Co.*, 311 U.S. 519 (1947), and railway labor's standing to sue was reaffirmed in *American Trucking Assns.* v. *U.S.*, 352 U.S. 816 (1956) and 355 U.S. 141, 144 (1957).

Railroad employee representatives may participate in cases before a reviewing court as well as before the ICC. *Railroad Trainmen, supra,* 331 U.S. at 529-30.

In a situation where the requisite injury is present for standing under Article III of the U.S. Constitution, it strains credulity to infer an intent by Congress to give railway labor statutory standing before the ICC, and statutory standing before the courts, but to deny railway labor standing to appeal from the ICC to the courts. Moreover, adversely affected parties have an independent right to judicial review under the Administrative Procedure Act, 5 U.S.C. 702, and also under the Hobbs Act for judicial review of ICC orders. 28 U.S.C. 2342(5), 2344.

There are no known decisions of this Court, or of any other court, which would purport to limit or overrule *Railroad Trainmen, supra*, 909 F.2d at 192 (App. B, 15a). Indeed, both the panel and dissenting opinions recognize that UTU (Simmons) frequently has instituted review actions in the court below. 909 F.2d at 187 n.1 and 191 n.1 (App. B, 4a n.1; 13a n.1).

The court of appeals offered no change of circumstances which might warrant a change in judicial outlook from that which has prevailed over the years with respect to the standing of labor organizations.

2. The court of appeals has made a clear departure from this Court's "zone of interest" test as recently clarified in *Clarke* v. *Securities Industry Assn.*, 479 U.S. 338 (1987). There is a presumption in favor of judicial review of agency action, 479 U.S. at 399. The test under "zone of interests" for prudential standing is not necessarily whether Congress in the Interstate Commerce Act intended to benefit railroad employees — job protection or otherwise — but whether Congress intended to preclude a particular plaintiff from suing to keep the agency in line with the Congressional enactment. In the final two sentences which were not included in the passage from *Clarke* quoted by the court below, 909 F.2d at 190 (App. B, 9a), this Court made it clear that there need be no indication of congressional purpose to benefit the would-be plaintiff, *Clarke*, 479 U.S. at 399-400:

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complaint of a particular agency decision. In cases where the plaintiff is not the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests

> are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*" (emphasis supp.)

Thus, the issue below should have been whether the UTU's interest in job protection is so "marginally related" or "inconsistent" with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit UTU to sue. However, instead of addressing this matter, the court of appeals said that the "pertinent provisions" of the Interstate Commerce Act are not intended to protect a rail employee's interest in retaining his job, therefore UTU's interest is not within the "zone of interests" for standing.

The court of appeals found only one "pertinent provision" — the "fair wages and safe and suitable working conditions" set forth as one of 15 criteria in the rail transportation policy, 49 U.S.C. 10101a(12). (App. F, 76a). 909 F.2d at 190 (App. B, 10a). However, as pointed out in the dissent, having a job is a necessary prerequisite to "fair wages and safe and suitable working conditions," such that loss of employment would fall within the zone of interests with which the Interstate Commerce Act is concerned. 909 F.2d at 192 (App. B, 16a).

Further, there are a number of other provisions in the Interstate Commerce Act which make specific provision for employee job protection. Some of these are set forth in the Appendix. For example, 49 U.S.C. 10901(e) deals with new line construction. (App. F, 77a-78a); 49 U.S.C. 10903(b)(2) deals with line abandonments (App. F, 78a); 49 U.S.C. 11344(b)(1)(D) deals with carrier mergers and control (App. F, 78a-79a); and 49 U.S.C. 11347 deals with the minimum

job protection required for abandonments and all carrier consolidations covered by 49 U.S.C. 11343 (App. F, 79a).

Additional provisions directed to employee protection are 49 U.S.C. 11103(c)(2) (reciprocal switching); 49 U.S.C. 11125(b)(4) (directed service), 49 U.S.C. 10722 (free passes); 49 U.S.C. 10910(e) (feeder line sales), and 49 U.S.C. 11350(b)(7) (secretary of transportation reports).

The court of appeals should have looked at all of the job protection provisions of the Interstate Commerce Act — not just "fair wages and safe and suitable working conditions." The court below correctly noted the involved ICC proceedings were "exemption" cases handled under 49 U.S.C. 10505, but section 10505(g)(2) (App. F, 77a) requires that the ICC in an exemption case not relieve a carrier of its obligations otherwise applicable to the provisions from which exemption is sought. Here, job protection is a consideration for the ICC in a line acquisition under 49 U.S.C. 10901.[1] Job protection is also a consideration in an abandonment case under 49 U.S.C. 10903 (App. F, 78a). Thus, job protection is neither inconsistent nor marginally related to UTU's interest in an acquisition or abandonment exemption.

Finally, the court of appeals erred in not relating job protection to other criteria of the rail transportation policy. Section 10505(a), the exemption provision, refers to the entire 49 U.S.C. 10101a, which embraces safety, efficiency, competition, sound economic conditions, etc. in railroad operations.

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[1]Where acquisition of an existing rail line is involved under 49 U.S.C. 10901, the ICC's consideration of employee protection stems from the overall "public convenience and necessity" findings and conditions, of which labor is one element. *See: I.C.C.* v. *Railway Labor Assn.*, 315 U.S. 373, 376-78 (1942); *Black* v. *I.C.C.*, 762 F.2d 106, 111 (D.C. Cir. 1985); *Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 813-14 (1985).

(App. F, 75a-76a). The dissent below quoted from the opinion of Justice Stone, writing for a unanimous Court in *United States* v. *Lowden*, 308 U.S. 225, 234, 235-36 (1939), that just and reasonable treatment of railroad employees is not only essential to the maintenance of service, but promotes safety and efficiency. 909 F.2d at 192-93 (App. B, 16a-17a).

Clearly, rail labor's interest in job protection is well within the "zone of interests" as to establish prudential standing.

3. The effect of the ruling below may be to accord a union limited standing to challenge the employee protective conditions imposed or not imposed by the ICC, although this may be an overly generous inference from the decision below. The ICC's argument below — that UTU could not raise the commodities clause (49 U.S.C. 10746) issue — seems directed to limited standing. However, the ICC has a policy — consistently maintained — of not imposing employee conditions in line acquisition cases. The ICC so stated in the instant *Acquisition* case. (App. D, 46a-47a). This Court also has recognized the practice of the ICC not to impose employee protection in acquisition cases, and labor unions no longer even waste their efforts in the attempt. *Pittsburgh & Lake Erie R. Co.* v. *R.L.E.A.*, 109 S.Ct. 2584, 2590-92 (1989).

Thus, the result of limiting a union's stand to a challenge of protective conditions would effectively deny standing to challenge the ICC's decision in any respect. Yet the validity of an ICC decision involves elements of the rail transportation policy which are interrelated with employment security *See: United States* v. *Lowden, supra.*

The short and complete answer to the ICC is that once standing to challenge the decision of an administrative agency is established, the petitioner may argue all aspects of the public interest, as recognized below. 909 F.2d at 190 (App. B, 10a). *Sierra Club* v. *Morton*, 405 U.S. 727, 737 (1972).

II. THE DECISION IN THE ABANDOMENT CASE IS SUBJECT TO THE SAME INFIRMITY AS THE ACQUISITION DECISION AND IS ALSO IN CONFLICT WITH THIS COURT'S DECISION IN *KALO BRICK*.

1. The court below denied UTU (Simmons) standing to challenge the ICC's *Abandonment* decision, for the same reasons given in denying UTU standing in the companion *Acquisition* case. 900 F.2d at 1027 (App. B, 25a-26a). The same arguments in support of a grant of a writ of certiorari for the *Acquisition* case are equally applicable here for UTU's standing in the *Abandonment* case.

2. The court of appeals' denial of standing for shippers to challenge an ICC abandonment decision is unsupported by any reported authority — ICC or court. The denial of standing was made on the court of appeals' own motion. The decision of the court below is irrational, since it is not within the shippers' knowledge as to how C&NW will serve Poplar Grove in the event the Chemung-Poplar Grove abandonment is reversed *and* C&NW is required to resume service on the Harvard-Chemung segment. Although the ICC opines that C&NW would have no incentive to repair the derailment (which is very minor), meaning that C&NW would operate a train very circuitously to serve Poplar Grove, while at the same time operating a train from Harvard to serve Chemung, which is only 6.5 miles from Poplar Grove. C&NW did not make a definitive statement on the record as to its contingency plans. Moreover, on C&NW's own data, it would be more economical to serve Poplar Grove from the Harvard-Chemung segment. (App. D, 65a-66a n.5).

The court of appeals decision is in conflict with this Court's decision in *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The ICC's processing of an abandon-

ment request is separate and apart from a shipper's action to recover damages for suspension of service owing to a line washout, or an injunctive action by a public body to restore service. Cf. 450 U.S. at 321-23 & n.9, 330 n.18.

It frequently occurs that a line is out of service pending an ICC abandonment proceeding, and sometimes it makes little sense to order a rail carrier to repair a line if an ICC decision is anticipated. See: *Asbury* v. *Chesapeake and Ohio Railway Company*, 264 F.Supp. 437 (D.D.C. 1967); *Asbury* v. *United States*, 298 F.Supp. 589 (W.D.Va. 1969); *I.C.C.* v. *Baltimore and Annapolis Railroad Company*, 398 F.Supp. 454, 461-63 (D.Md. 1975).

The shippers should not shoulder the burden of proof as to what action C&NW will take if the *Abandonment* and *Acquisition* agency decisions are set aside. The shippers have standing to challenge the abandonment. Clearly, the evidence of record indicates that service on the Poplar Grove-So. Beloit segment was performed at a loss, whereas service on the Harvard-Chemung-Poplar Grove line was performed at a profit. (App. D, 65a-66a n.5).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgments of the United States Court of Appeals in these cases.

Respectfully submitted,

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December 14, 1990

APPENDIX A

Supreme Court of the United States

No. A-307

Patrick W. Simmons, McLay Grain Company and Edenfruit Products Company,

Petitioners

v.

Interstate Commerce Commission, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 30th, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of October, 1990.

SUPREME COURT OF THE UNITED STATES

No. A-307

PATRICK W. SIMMONS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

PATRICK W. SIMMONS, ET AL.,
Petitioners.

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cases, be and the same is hereby, extended further to and including December 14, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of November, 1990

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-3207

PATRICK W. SIMMONS,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

and

CHICAGO-CHEMUNG RAILROAD CORPORATION,

Intervening Respondent.

On Petition for Review of an Order
of the Interstate Commerce Commission

ARGUED DECEMBER 14, 1989—DECIDED APRIL 16, 1990

Before CUMMINGS, FLAUM, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Petitioner Patrick W. Simmons[1] has asked this court to review the action of the Interstate

[1] Simmons is the Legislative Director of the United Transportation Union (UTU), some members of which are alleged to work for C&NW. Simmons does not even have putative standing to sue

(Footnote continued on following page)

Commerce Commission (ICC), which declined to revoke a class exemption pertaining to the sale of Chicago and North Western Transportation Company's (C&NW's) Harvard-Chemung railroad line. For reasons which follow, the petition is dismissed for lack of standing.

I. BACKGROUND

For a number of years, C&NW has sought to abandon its Illinois line between Harvard and South Beloit, Wisconsin, a distance of 23.4 miles. C&NW filed its first abandonment application on March 31, 1981, contingent upon its acquiring track rights over a line owned by Chicago, Milwaukee, St. Paul and Pacific Railroad Company (MILW) between Clinton Junction and Beloit, Wisconsin. A number of shippers filed protests. C&NW withdrew its application when MILW indicated it would abandon the Clinton Junction-Beloit line. C&NW next filed for abandonment of the Harvard-South Beloit line on April 21, 1987, again encountering substantial opposition. C&NW again withdrew its application. In permitting C&NW to withdraw its abandonment request for the second time, the ICC stated that in the future C&NW would be required to comply with the system diagram map provisions, and file a notice of intent and updated evidence in any new abandonment application.

Rather than file a new application for abandonment of the Harvard-South Beloit line, C&NW instituted a series of transactions. These efforts were: (1) the transfer of the eastern 3.5-mile Harvard-Chemung segment for operation by Chicago-Chemung Railroad Corporation (CCRC); (2) use

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[1] *continued*

as an individual; he apparently intended to sue on behalf of the UTU. We therefore will treat Simmons as if he sued in an official capacity. *United Transportation Union v. ICC*, 891 F.2d 908, 909 n.1 (D.C. Cir. 1989). Since Simmons frequently litigates these matters, in the future he should file in the name of the appropriate party.

of the out-of-service class abandonment exemption to secure automatic abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 3.4-mile Poplar Grove-South Beloit segment.

CCRC filed a notice with the ICC on September 16, 1987 that it intended to acquire the Harvard-Chemung segment pursuant to an acquisitions exemption adopted by the ICC in 1985. The ICC adopted the exemption pursuant to 49 U.S.C. §10505(a) for all §10901 sales of a rail line to a new carrier. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901*, 1 I.C.C.2d 810 (1985), *aff'd sub. nom, Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). Patrick Simmons, in his capacity as the Illinois Legislative Director of the UTU, filed a petition on September 21, 1987 asking the ICC to stop the acquisition. Simmons made allegations concerning the effect of the sale on C&NW employees; he asserted inefficiency of a 3.5-mile operation; CCRC's viability; the impact on future service by C&NW to shippers located at Poplar Grove; CCRC's relationship to the primary shipper on the line, Seegers Grain Company; and Seegers' concentration of market power vis-a-vis rival grain elevators located on C&NW's line beyond Chemung. The ICC declined to issue an administrative stay, denied Simmons' discovery requests, and declined to revoke the exemption for the line.

With respect to CCRC's operation of the line, the ICC observed that "the line is earning an operating profit, notwithstanding its low traffic volume, and that the traffic volume will increase, perhaps significantly" due to Seegers' projected additional thousand carloads per year. The Commission stated:

> Simmon's [sic] generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line.

> Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line's shippers.

Decision Denying Petition to Revoke, at 3 (March 14, 1988).

Next, the ICC considered Simmons' argument that the sale of the Harvard-Chemung segment would remove any incentive for C&NW to repair the Poplar Grove-Chemung segment, leaving the Poplar Grove shippers with a more circuitous routing to Chicago than they have been using. The ICC considered it unlikely that C&NW would repair the Poplar Grove-Chemung segment whether or not it retained the Harvard-Chemung segment, considering C&NW's operating losses on the Poplar Grove-Chemung segment. Moreover, the ICC considered the increased mileage for the Poplar Grove traffic to be modest and not likely to jeopardize the quality of service.

The ICC saw no reason to believe that shippers on the Harvard-Chemung line would be adversely affected by the acquisition. The ICC dismissed Simmons' argument that Seegers' control of CCRC would result in a concentration of market power that would adversely affect rival off-line shippers. The ICC noted that rival shippers will continue to be served directly by C&NW and will look to C&NW for competitive rates to Chicago. The ICC noted CCRC's affiliation with Seegers through a small group of common stockholders, but further noted that the mere ownership of a railroad by its principal on-line shipper is not prohibited by 49 U.S.C. §10746, commonly referred to as the "commodities clause." While the statute would not permit CCRC to operate as an alter ego of Seegers, the ICC found no indication that this is the case and saw no reason to investigate further.

Finally, the ICC addressed Simmons' claims that members of the UTU would be injured by the sale:

> Simmons claims that CNW employees will be adversely affected and irreparably injured by the loss

> of jobs, but he does not provide specific details as to the number of employees affected, if any, or the nature of the effect of the transaction on them. He has not shown a likelihood to prevail on the merits with respect to labor protection nor has he shown that the employees could not be made whole in the event that the Commission imposes labor protection in any exemption revocation.

Decision Denying Administrative Stay, at 3 (Sept. 22, 1987). The ICC rejected Simmons' arguments on behalf of the C&NW employees and on behalf of the public interest.

Simmons filed a petition to reopen, on the grounds that the profitability of the Poplar Grove-Chemung line had not been correctly calculated, that the ICC had applied an unwarranted assumption that new short-line carriers provide better service than their prior owners, and that without discovery concerning the relationship between Seegers and CCRC the ICC could not properly assess the market power argument. The ICC declined to reopen the case. Simmons petitioned this court to review the agency action pursuant to 28 U.S.C. §2321(a). CCRC and C&NW have intervened.

II. ANALYSIS

The ICC has challenged Simmons' standing to petition for review, arguing that the labor interests represented by Simmons do not fall within the zone of interests protected by the Interstate Commerce Act. Although substantial evidence in the record appears to support the ICC on the merits, we first must determine whether Simmons has standing.

Simmons points to injuries that might be incurred by shippers, competitors, and the public at large. However, Simmons only represents labor interests, specifically the interests of those UTU members adversely impacted by

the ICC's decision.[2] These UTU members must have standing in their own right, for Simmons cannot rest his claim on the interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

Standing is limited both by Article III requirements and prudential concerns. The Seventh Circuit summarized the Article III requirements in *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988):

> In order for a party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision.

Simmons alleges that members of the UTU will lose their jobs due to the sale of the line. This injury satisfies all three prongs of the Article III standing requirement. However, Simmons must also satisfy prudential limitations on standing.[3]

One such requirement is the "zone of interest" standing test first articulated in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). See Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d §3531.7. The Supreme Court explained the application of the zone of interest test to the

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[2] For the UTU (represented by Simmons) to have standing to represent its members, it must show that UTU members would have standing to sue in their own right, that the interests being asserted are germane to the UTU's purpose, and that individual UTU members are not needed to participate. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

[3] Prudential limitations "deny standing as a matter of judicial prudence rather than constitutional demand." Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d §3531.7.

review of an agency action in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987):

> The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. at 399. The Court noted that in past decisions it had "recognized the presumption in favor of judicial review of agency action, but held that this presumption is 'overcome whenever the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme" '." *Id.*, quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), quoting *Data Processing*, 397 U.S. at 157.

Clarke involved a trade association representing securities brokers, underwriters, and investment bankers bringing an action for review of an agency decision under the National Bank Act.

> In considering whether the zone of interest test provides or denies standing in this case, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. §36, and does not adequately place §36 in the overall context of the National Bank Act. As *Data Processing* demonstrates, we are not limited to considering the statute under which respondent sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act.

Clarke, 479 U.S. at 401. The Court concluded that the respondent in *Clarke* was within the zone of interests intended to be protected by the National Bank Act.

The issue in this case is whether the Interstate Commerce Act, 49 U.S.C. §10101 et seq., was enacted to protect the zone of interests asserted in this case; i.e., the interest of rail employees in retaining their jobs. 49 U.S.C. §10505(g) states that "the Commission may not exercise its authority [to exempt transactions] under this section . . . to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle [the Interstate Commerce Act]." Section 10505(a) specifically refers to §10101(a), which lists the overall interests which the Interstate Commerce Act seeks to protect through its rail transportation policy. The policy mainly concentrates on maintaining a safe and competitive railroad system. In contrast to other provisions of the Act, the only stated interest specifically applicable to rail employees is contained at subsection 12: "To encourage fair wages and safe and suitable working conditions in the railroad industry . . . ." The pertinent provisions of the Interstate Commerce Act clearly are not intended to protect a rail employee's interest in retaining his job. Therefore the Act's zone of interests does not encompass the only UTU members' interest which Simmons alleges the ICC's action threatens. Simmons has no standing to petition for review under *Clarke*.

Simmons argues he has standing as a representative of the public, citing *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4 (1942), and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). However, as the Supreme Court noted in *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972): "Taken together, *Sanders* and *Scripps-Howard* . . . established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. It was in the latter sense that the 'standing' of the appellant in *Scripps-Howard* existed only as a 'representative of the public interest.' " (Footnotes omitted.)

Since Simmons has not established standing in his own right (as representative of UTU members), he cannot have standing as a representative of the public interest.

For these reasons Simmons' petition for review is dismissed for lack of standing.

DISMISSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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In the
United States Court of Appeals
For the Seventh Circuit

No. 88-3207

PATRICK W. SIMMONS,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

and

CHICAGO-CHEMUNG RAILROAD CORPORATION and
CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY,

Intervening Respondents.

On Petition for Rehearing and Rehearing En Banc

REHEARING and SUGGESTION for
REHEARING EN BANC DENIED—AUGUST 2, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, *Circuit Judges.*

On May 1, 1990, the petitioner filed a petition for rehearing with suggestion for rehearing en banc. An answer to the petition was requested and joint responses thereto were filed by respondents Interstate Commerce Commission

and United States of America as well as by intervening respondents Chicago and North Western Transportation Company and Chicago-Chemung Railroad Corporation. All of the judges on the original panel voted to deny a rehearing. A judge in regular active service requested a vote on the suggestion for rehearing en banc and the majority of the judges voted to deny an en banc rehearing. CUDAHY and RIPPLE, *Circuit Judges*, voted to grant rehearing. Accordingly, the petition for rehearing is hereby DENIED.

CUDAHY, *Circuit Judge*, with whom RIPPLE, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc:

The present *Simmons* opinion denies standing to railroad labor to challenge the exempt acquisition of a rail line under the Interstate Commerce Act (the "ICA"). This is a decision of exceptional importance since it is the first known instance in a very long history of employee participation where standing has been denied to railroad labor in a proceeding in which job elimination is a consideration. There have, of course, been many thousands of administrative proceedings and appeals to the courts involving line abandonments, mergers, line sales and the like in which employee representatives have participated without question both in the agency and in court.[1] To assert that job protection lies outside the "zone of interests" arguably protected by the ICA seems to me to ignore the history of railroad regulation for most of the twentieth century. The ICA certainly recognizes loss of jobs

[1] Patrick Simmons is the Illinois Legislative Director of the United Transportation Union. Simmons has appeared quite recently before this court. On these occasions, his claims were considered on the merits; no attack was mounted to his standing to seek review of ICC decisions affecting the railroad employees he represents. *See Simmons v. ICC*, 871 F.2d 702 (7th Cir. 1989); *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Simmons v. ICC*, 766 F.2d 1177 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

as a crucial problem, even if the principal mode of "protection" is via the imposition of conditions of compensation.

The full court ought to consider whether the zone of interests test has been applied too narrowly here and without sufficient attention to congressional intent as incorporated in a number of the ICA's provisions applicable to various forms of restructuring rail service. *See, e.g.*, 49 U.S.C. §§ 11347, 10901(e), 10505(g). Rail employees, through their representatives, have a statutory right to participate in ICC proceedings affecting labor interests. 49 U.S.C. section 10328(a) provides:

> (a) Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.

The affected employees' right of intervention in both ICC *and* judicial proceedings was declared more than four decades ago in *Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519 (1947). Interpreting section 17(11) of the ICA[2]—the predecessor to the current section 10328(a)—the Supreme Court expressly rejected an argument that affected employees could intervene only in proceedings before the Commission but not in court proceedings. The Court said:

> Here the meaning of § 17(11) is unmistakable on its face. There is a simple, unambiguous reference to "any proceeding arising under this Act" or, as the House committee paraphrased it, to "any proceedings arising under part I." There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission. The proceedings mentioned are those which arise under this

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[2] Section 10328(a) is virtually identical to the former section 17(11), which provided:

> Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

> Act, an Act under which both judicial and administrative proceedings may arise. . . .
>
> Nor do we perceive any reason of statutory policy why the framers of § 17(11) should have wished to confine the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both proceedings, we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way.

331 U.S. at 529-30 (footnotes omitted). The Court reaffirmed its view that employees have standing to intervene in *any* proceeding arising under the Act in *American Trucking Ass'ns v. United States*, 355 U.S. 141, 144, 146-47 (1957). The present opinion cites no decision of the Supreme Court or, indeed, of any other court that purports to limit or overrule *Baltimore & Ohio*.

The panel's opinion correctly notes that there is a presumption in favor of judicial review of agency action. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987) (construing section 10 of the Administrative Procedure Act, 5 U.S.C. § 702). Because of this presumption, the Supreme Court declared in *Clarke* that the zone of interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400 (footnotes omitted). As I have indicated, the ICA in fact makes specific provision for the protection of railroad workers in a number of railroad restructuring schemes. Further, rail labor's statutory right of intervention alone ought to indicate that employees' interests are not "marginally related to or inconsistent with the purposes implicit in" the Interstate Commerce Act. *Clarke*, 479 U.S. at 399. The whole court ought to

weigh the apparently implausible proposition that Congress would by statute guarantee employees a role in ICC proceedings and in the courts, but, without any express provision to that effect, intend to deny them standing to appeal from one to the other.

There is certainly a strong possibility that the panel's construction of 49 U.S.C. section 10101a(12) undermines Congress's intention that the voice of labor be heard. Section 10101a(12) provides that it is the policy of the United States Government to encourage fair wages and safe and suitable working conditions in the railroad industry. Having a job is obviously a necessary prerequisite to "fair wages and suitable working conditions." Loss of employment would therefore seem to fall squarely within the zone of interests with which the ICA and other railroad regulatory and deregulatory legislation is concerned.

Indeed, it has evidently gone unquestioned for decades that the potential impact of ICC decisions upon railroad employees falls within the zone of interests protected by the ICA. More than fifty years ago—long before the coining of the phrase "zone of interests"—Justice Harlan Fiske Stone recognized that the "public concern," as defined by the ICA, encompasses the blow to railroad employees who suffer displacement in the wake of a railroad consolidation. Writing for a unanimous Court, Justice Stone observed:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.
>
> . . .
>
> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not

> only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

United States v. Lowden, 308 U.S. 225, 234, 235-36 (1939). It appears that the panel in this case may have overlooked this history lesson.

It may be that the ICA does not explicitly provide for the preservation of jobs as a goal in and of itself. But the procedures set up under the Act surely recognize that loss of jobs is an inevitable and unfortunate result of railroad consolidations and abandonments, and, consequently, the Act provides that those affected have a right to be heard. A hearing is all that has been asked of us here.

This case presents a very difficult and important question—one which deserves the consideration of the entire court. I therefore respectfully dissent from the court's denial of rehearing en banc.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 88-3211 & 89-1961

PATRICK W. SIMMONS, MCLAY GRAIN COMPANY and EDENFRUIT PRODUCTS COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents,

and

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Intervenor-Respondent.

On Petitions for Review of the Orders of the Interstate Commerce Commission

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ARGUED DECEMBER 14, 1989—DECIDED APRIL 16, 1990

Before CUMMINGS, FLAUM, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Petitioners Patrick W. Simmons, McLay Grain Company, and Edenfruit Products Company, have asked this court to review the action of the Interstate Commerce Commission (ICC), which declined to revoke the "out-of-service" class exemption for

the abandonment of Chicago and North Western Transportation Company's (C&NW's) Chemung-Poplar Grove line. For reasons which follow, the petitions are dismissed for lack of standing.

I. BACKGROUND

For a number of years, C&NW has sought to abandon its Illinois line between Harvard and South Beloit, a distance of 23.4 miles. C&NW filed its first abandonment application on March 31, 1981, contingent upon C&NW acquiring track rights over a line owned by Chicago, Milwaukee, St. Paul and Pacific Railroad Company (MILW) between Clinton Junction and Beloit, Wisconsin. A number of shippers filed protests. C&NW withdrew its application when MILW indicated it would abandon the Clinton Junction-Beloit line. A train derailed east of Poplar Grove in November 1986. The resulting damage has never been repaired. C&NW next filed for abandonment of the Harvard-South Beloit line on April 21, 1987, again encountering substantial opposition. C&NW again withdrew its application. In permitting C&NW to withdraw its abandonment request for the second time, the ICC stated that in the future C&NW would be required to comply with the System Diagram Map provisions, and file a notice of intent and updated evidence in any new abandonment application.

Rather than file a new application for abandonment of the Harvard-South Beloit line, C&NW instituted a series of transactions. These efforts were (1) the transfer of the eastern 3.5-mile Harvard-Chemung segment for operation by Chicago-Chemung Railroad Corporation (CCRC); (2) use of the out-of-service class abandonment exemption to secure automatic abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 13.4-mile Poplar Grove-South Beloit segment. On March 14, 1988, the ICC denied Patrick Simmons' petition to revoke CCRC's use of the class exemption for non-carrier

acquisition of rail lines with respect to the eastern Harvard-Chemung segment. On September 12, the ICC denied Simmons' motion to reopen its decision not to revoke. Simmons subsequently filed a petition for review in this court. As to the 6.5-mile Chemung-Poplar Grove segment, C&NW invoked the abandonment class exemption for out-of-service lines. This class exemption was available not on the basis of the derailment, but instead because all traffic over the 6.5-mile segment within two years was overhead bridge business. No local business (business from shippers and receivers actually located on the segment) operated on the 6.5-mile segment. The exemption requires only that (1) no local traffic has moved for at least two years; (2) any overhead traffic can be rerouted over other lines; and (3) no user of rail service on the segment has complained. 49 C.F.R. §1152.50 (1989 ed.).

C&NW's notice of exemption asserted that no local traffic was handled on the 6.5-mile segment during the past two years, all overhead traffic was moving over an alternate route over the past one and one-half years, and no formal complaints regarding cessation of local service had been filed. The ICC gave public notice of C&NW's exercise of the exemption, stating petitions for stay and for reconsideration could be filed. McLay Grain Company, Edenfruit Products Company, and Patrick W. Simmons[1] filed a joint petition for stay of the abandonment exemption. McLay Grain Company, situated at Poplar Grove, formerly shipped about 600 cars per year, but has not shipped any traffic by rail since the 1970s. McLay claims it would suffer competitive injury if Seegers Grain Company at Chemung should acquire and McLay should lose rail service. Edenfruit Products Company has a private rail side track and unloading facilities at Poplar Grove. It shipped 15 carloads in 1978, 25 carloads in 1979, but

[1] Simmons is the Legislative Director of the United Transportation Union (UTU), some members of which are alleged to work for C&NW.

only one carload in the past four years. Since the November 1986 derailment, C&NW has rerouted eastbound Poplar Grove traffic to South Beloit and from there over another route through Beloit, Wisconsin to Harvard, Illinois, adding approximately 32 miles to its Poplar Grove to Chicago operations. Neither Edenfruit nor McLay is situated on the 6.5-mile segment; the two are located a short distance to the west.

The petitioners claim that the abandonment of the Chemung-Poplar Grove segment would prejudice the ultimate disposition of the ongoing Harvard-Chemung proceeding. They also claim the stated use of the abandonment class exemption for the Chemung-Poplar Grove segment constituted an abuse of the class exemption because of its relationship with other C&NW claims for line disposition.

On November 3, 1988, the petitioners filed a petition to revoke and/or for reconsideration of the Chemung-Poplar Grove abandonment class exemption. The ICC denied the stay request by a 3-1 vote. The ICC majority stated that the use of the class exemption is fully consistent with the rail transportation policy so as to allow C&NW to abandon the least profitable segment, such as the one which has been out of service, and that at this point it is speculative whether C&NW will file an application to abandon the Poplar Grove-South Beloit segment or whether abandonment would be authorized. Moreover, if the Poplar Grove-South Beloit abandonment is filed and if it has environmental implications which carry over to the area between Chemung and Poplar Grove, those implications can be addressed at that time. The ICC majority stated it was unclear how petitioners would be prejudiced by the class exemption in the Harvard-Chemung case or a forthcoming South Beloit-Poplar Grove case. The ICC majority also reasoned that the public interest arguments had already been balanced in the class exemption itself.

On May 8, 1989, the ICC denied the petition for revocation and/or reconsideration by a 3-2 vote. The ICC majority concluded that even if C&NW retained the Har-

vard-Chemung line, it would have no incentive to repair the derailment in order to continue the Chemung-Poplar Grove operation. The ICC's decision faulted petitioners for not showing how segmented handling of the Harvard-South Beloit line could subject shippers to market abuse since truck service is available and McLay Grain Company has not used C&NW since the 1970s. The ICC found that the Poplar Grove complaints filed in the 1987 C&NW abandonment case did not constitute a formal complaint within the out-of-service regulations during the prior two-year period because the complaints were against abandonment of the entire Harvard-South Beloit line.

Finally, the ICC addressed the environmental issue. The ICC stated that it may approve a single application without first completing a comprehensive impact statement on all environmentally interrelated regionwide proposals. The ICC defended limiting its environmental review solely to the Chemung-Poplar Grove segment rather than to the Chemung-South Beloit line because Chemung and Poplar Grove are logical termini, the segment is substantially independent in terms of its utility, and allowing the segment's abandonment does not foreclose the opportunity to consider an alternative treatment of subsequently proposed segment abandonments.

Patrick Simmons, McLay Grain Company, and Edenfruit Products Company now file a petition for review with this court. The petitioners urge that we overturn the ICC's orders on a number of grounds: the class exemption as applied in a particular situation is subject to challenge on public interest grounds; the ICC misconstrues the opinions of the Seventh Circuit regarding line segments in ICC abandonment proceedings; the ICC's failure to render findings for the entire Harvard-South Beloit line prior to permitting abandonment of the Chemung-Poplar Grove segment is arbitrary and capricious agency conduct; the ICC's finding regarding abuse of market power is arbitrary and capricious; the ICC's finding on track repairs is arbitrary and capricious; and the ICC's environmental analysis is deficient and requires a remand.

II. ANALYSIS

Although substantial evidence in the record appears to support the ICC on the merits, we first must determine whether petitioners have standing. No party raised this issue in its briefs. Nevertheless, the court may consider standing on its own motion since it impacts subject matter jurisdiction. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 573 & n.2 (3d Cir. 1980). If the petitioners have no standing, there is no case or controversy, and the court does not have the power to entertain the case under Article III of the Constitution. *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

"In order for a party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision." *Id.*, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The petitioners in this case allege that they will suffer competitive injury by not being able to ship along the abandoned line, whereas their competitors will be able to utilize rail shipment. Furthermore, they challenge the ICC's environmental analysis. Finally, Patrick Simmons alleges that members of the UTU (which he represents) will lose their jobs due to the abandonment of the line.

An allegation of competitive injury is sufficient to satisfy the first prong of the standing test. However, the injury is not traceable to the ICC's action in this case. Petitioners challenge the ICC's Notice of Exemption, its decision denying a stay of the abandonment, and its decision denying petitions for reconsideration and revocation of the abandonment exemption. These actions pertain only to the question of whether C&NW may abandon the line; they

are unrelated to the question of whether C&NW must open the line for use by the petitioners. The November 1986 derailment damaged the 6.5-mile stretch of track which C&NW hopes to abandon. Therefore no traffic used that track for at least a year and one-half before the institution of this action before the ICC. The ICC has held that C&NW would have no incentive to repair the derailment on the track. The petitioners suggest that this finding is inconsistent with the ICC's previous statements that repair of the derailment was merely unlikely. Even if this is true, we note that the petitioners have the burden to allege facts sufficient to support their standing. *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). There is no evidence in the record or even any allegation that C&NW would likely repair the derailment if the request to abandon were denied. Any suggestion that C&NW would reopen the damaged track is pure speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). See also *Warth v. Seldin*, 422 U.S. 490 (1975).

To summarize, the most this court can do in response to petitioners' request is to stop C&NW's abandonment of the track; we cannot force C&NW to repair the damaged line. Since only the repair of the damaged line will suffice to redress the injuries alleged by petitioners, petitioners have failed to meet the third prong of the standing test outlined in *City of Evanston*.

The petitioners also challenge the ICC's environmental analysis. Injury to petitioners' environmental interests is sufficient to satisfy Article III's requirement of an injury in fact. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*,

405 U.S. 727, 734 (1972). "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35. In *Sierra Club*, the United States Forest Service decided to allow development of Mineral King Valley in California for recreational purposes. The Sierra Club, an organization interested in environmental protection, sued the Secretary of the Interior to stay approval of the project. The Sierra Club claimed it had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." *Id.* at 730. The Sierra Club alleged the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734. The Supreme Court held that the alleged harm might be an injury in fact to members of the public, but nevertheless denied standing because the Sierra Club never alleged that any of its members would be individually injured by the development.

In this case, the petitioners have not alleged either at the administrative level or on appeal that they will be adversely affected by any environmental damage caused by the abandonment. In fact, the petitioners have not alleged any specific environmental damage; they only argue that the ICC did not use the proper procedure in making its environmental impact findings. Thus the environmental issue cannot provide the basis for the petitioners' standing in this case.

Finally, Patrick Simmons alleges that UTU members will lose their jobs due to the abandonment. This injury satisfies all three prongs of the Article III standing requirement. However, standing is also limited by prudential concerns.[2] One requirement of prudential standing is the "zone of interest" test:

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[2] Prudential limitations "deny standing as a matter of judicial prudence rather than constitutional demand." Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d §3531.7.

> The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Clarke v. Securities Industry Association, 479 U.S. 388, 399 (1987). As this court holds in *Simmons v. Interstate Commerce Commission*, No. 88-3207, the companion to this case, rail employees' interests in retaining their jobs are not within the zone of interests protected by the Interstate Commerce Act.

Therefore none of the asserted interests—competitive, environmental, or labor—can serve as a basis for the petitioners' standing in this case. For this reason, petitioners' action is dismissed for lack of standing.

DISMISSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1989

By the Court:

PATRICK W. SIMMONS,
Petitioner

v.

No. 88-3207 INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents

and

CHICAGO-CHEMUNG RAILROAD CORPORATION,
Intervening-Respondent

Petition for Review of an order of the Interstate Commerce Commission

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR LEAVE TO INTERVENE" filed on December 11, 1989, by McLay Grain Company.
2. "OPPOSITION OF INTERSTATE COMMERCE COMMISSION TO MOTION TO INTERVENE" filed December 12, 1989.

The proposed intervenor fails to set forth compelling reasons to support his untimely motion. *See* Fed. R. App. P. 15 (d)

Accordingly,

IT IS ORDERED that the MOTION FOR LEAVE TO INTERVENE is DENIED as untimely.

*Counsel for the parties notified by telephone.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE
SEP 29 1987

Finance Docket No. 31110

CHICAGO-CHEMUNG RAILROAD CORPORATION — EXEMPTION, ACQUISITION AND OPERATION — RAIL LINE OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY BETWEEN HARVARD AND CHEMUNG IN MCHENRY COUNTY, IL

Decided: September 22, 1987

On August 31, 1987, Chicago-Chemung Railroad Corporation (CCRC) filed a notice of exemption under 49 CFR 1150.31 to acquire and operate a 3.5 mile line of the Chicago and North Western Transportation Company (CNW) between milepost 64.0 near Harvard, IL, and milepost 67.5 near Chemung, IL. The transaction includes 0.5 miles of incidental trackage rights, between milepost 64.0 and milepost 63.5. Assertedly this is to enable CCRC to use CNW's passing track for interchanging trainloads of grain. On Sepember 4, 1987, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, filed a petition to reject, stay, revoke, and/or investigate, and on September 11, 1987, the notice of exemption was rejected for failure to contain a consummation date.

On September 16, 1987, CCRC filed a new notice of exemption and included a consummation date. Simmons did not file a new pleading. However, with the exception of the rejection issue, his former pleading applies equally to the new notice, and the time constraints require immediate resolution

of the former stay request. His request for revocation and institution of an investigation will be handled at a later date.

To justify the grant of a petition for stay, a petitioner must demonstrate (1) that there is a strong likelihood that he will prevail on the merits; (2) that he will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *See Washington Metropolitan Area Tourist Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Simmons has not demonstrated the requisite justification for a stay under any of the above criteria.

Simmons has not shown that he is likely to prevail on the merits. He contends that CCRC has not shown itself capable of conducting viable rail operations and alleges that the line is too short for economical operation. Thus, he contends that shippers will suffer poor service and the possible imposition of branch line surcharges. These arguments are speculative at best. The Commission's rules, promulgated in *Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986) (*Class Exemption*), do not require the submission of detailed financial and operating data nor is there anything to suggest that CCRC cannot run a viable operation. To the contrary, if as alleged by Simmons, CCRC is owned by or related to Seegers Grain, an operation of grain elevators, then it would appear that CCRC has every incentive to serve Seegers with viable rail operations.[1] Simmons' allegation that

[1]Simmons seems to suggest that the line's primary commodity is grain, and that the incidental trackage rights may be used only for "grain trains." On the other hand, he indicates that, while Seegers has elevators at Chemung and Harvard, it has no facilities on the 3.5-mile segment that are connected to the rail line, and he does not refer to the existence of any other grain shippers on the line or using it. It is difficult, under the circumstances, to reconcile the facts with his allegations.

Federal or State funding is involved also suggests that there is adequate funding for the transaction. Simmons notes that the line operates profitably under CNW but offers no reason why profitable operation cannot continue as a short line under CCRC's ownership.

Simmons contends that the transaction may adversely affect shippers on the line as well as certain shippers to the west of the line. Since CCRC may be related to Seegers Grain, and the stated purpose of the 0.5 miles of trackage rights allegedly is for the interchange of grain trains, Simmons contends that CCRC has not shown that it would interchange non-grain traffic for the line's other shippers. Because grain may be the line's primary commodity and receive greater emphasis, there is no reason to believe that CCRC will ignore its common carrier obligation to the line's other shippers. To the contrary, shippers usually benefit when a smaller, lower-cost, locally managed carrier is substituted for a larger Class 1 carrier. In any event, Simmons has not shown reason to believe that non-grain traffic will even be excluded from the trackage rights line.

Simmons also states that the CNW line west of Chemung has been severed by a derailment. He questions whether CNW will make the necessary repairs if it sells the eastern part of the line to CCRC, and he contends that shippers on the CNW line west of the derailment would be adversely affected if the line is not repaired. In this regard, he also notes that CCRC has not indicated whether it would interchange traffic with CNW west of Chemung. There is nothing of record to suggest that CNW will not repair the track disruption. Moreover, this issue is not relevant to the instant transaction. In any event, all shippers both east and west of the derailment, have been receiving service, and there is no indication that any will lose service.

Simmons contends that Seegers' alleged ownership of the

line will concentrate excessive market power in the grain company and will be unfair to competing grain elevators on the CNW line west of Chemung. Simmons has not shown, nor is there reason to suspect that CCRC will discriminate against other affected shippers. However, Seegers' relationship with of CCRC may fall within the purview of 49 U.S.C. 10746, and this issue will be considered by the Commission in connection with its consideration of Simmon's revocation petition. In any event, the likelihood of Simmons prevailing on this issue is very small. *See United States* v. *South Buffalo R. Co.*, 333 U.S. 771 (1948).

Simmons also contends that the presence of "Chicago" in the new carrier's name indicates that it plans to extend its operations beyond the Harvard-Chemung line and that this would lead to the further concentration of grain marketing. This allegation is speculative and without any substantiation. Moreover, any expansion of CCRC's operations would be subject to Commission approval.

With respect to all of these allegations, appropriate remedies such as a complaint alleging discrimination or failure to provide statutorily required common carrier service as well as petitions to revoke CCR's exemption may be filed at any time. In *Class Exemption, supra,* the Commission stated:

> [A]ny transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accordance with the provisions of the rail transportation policy.

Simmons has failed to show exceptional circumstances that make these remedies inadequate here.

Simmons claims that CNW employees will be adversely affected and irreparably injured by the loss of jobs, but he does

not provide specific details as to the number of employees affected, if any, or the nature of the effect of the transaction on them. He has not shown a likelihood to prevail on the merits with respect to labor protection nor has he shown that the employees could not be made whole in the event that the Commission imposes labor protection in any exemption revocation. *See Class Exemption, supra,* at 813-815.

While the absence of a stay is unlikely to cause irreparable harm to rail employees and shippers, a stay of the effective date of the exemption is likely to cause harm to CCRC and the shippers it intends to serve. It would delay the start of CCRC's operations and prevent a smooth transition from CNW to CCRC service on September 24, 1987.

Simmons has failed to show that the public interest supports the grant of a stay. The purpose of the *Class Exemption, supra,* is to permit the smooth transition of ownership and operation of small lines to new operators. The public interest is better served by permitting the proposed operation to commence as soon as possible, on its scheduled consummation date. Clearly it is not in the public interest to delay the transaction merely because of speculation that some correctible harm may occur.

Simmons has not demonstrated that a stay of the effective date of the notice of exemption is warranted. The request for stay will be denied.

Because of the prior rejection and refiling, CCRC and CNW may not realize that Simmons' petition to revoke is still under active consideration. They will be permitted to file a response within 20 days from the service date of this decision.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons would have granted the stay request.

(SEAL)

Noreta R. McGee
Secretary

INTERSTATE COMMERCE COMMISSION

DECISION SERVICE DATE
MAR 18 1988

Finance Docket No. 31110

CHICAGO-CHEMUNG RAILROAD CORPORATION — EXEMPTION, ACQUISITION AND OPERATION — RAIL LINE OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY BETWEEN HARVARD AND CHEMUNG IN MCHENRY COUNTY, IL

Decided: March 14, 1988

Petitioner, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, seeks revocation of the notice of exemption filed by Chicago-Chemung Railroad Corporation (CCRC) on September 16, 1987. CCRC filed the notice of exemption under 49 CFR 1150.31, *et seq.*, to acquire and operate a 3.5-mile line of the Chicago and North Western Transportation Company (CNW) from milepost 64.0 near Harvard, IL, where it connects with the CNW mainline between Chicago, IL, and Madison, WI, west to milepost 67.5 near Chemung, IL (Chemung line),[1] and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5.

CCRC originally filed the notice on August 31, 1987. Simmons petitioned to reject, stay, revoke,and/or investigate on September 3rd, and on September 11th, we rejected the notice

[1]The actual purchaser was the McHenry State Bank (Bank), as Trustee under Trust No. 4100. CCRC will be the beneficial owner and operator of the line. The purchase price was $150,000, and the proposed consummation date was September 24, 1987. CCRC states that the transaction has been consummated.

for failure to state a consummation date. *See* 49 CFR 1150.33 (e)(2). CCRC filed a supplemental notice on September 16th, and Simmons renewed his pleading on September 21st. By decision served September 29th, we denied Simmon's request to stay the notice's effective date. CCRC responded to Simmons' petition on October 19th.

On September 29th, Simmons requested reopening of the stay decision, contending that we had failed to consider his September 21st pleading. Since we had considered all of Simmons' pleadings in that decision, we denied the reopening request in a decision served October 29th, and specifically noted that all of Simmons' pleadings had been considered in our September 29th decision.

Simmons now contends that CCRC's class exemption should be revoked under 49 U.S.C. 10505(d), because application of 49 U.S.C. 10901 to CCRC and the proposed transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. He questions the viability of the proposed operation and contends that: (1) the operation of the short line will be inefficient; (2) shippers located west of the line will be adversely affected; (3) market power will be concentrated in the hands of Seegers Grain, Inc. (Seegers), a grain company that will control and be served by CCRC; and (4) there will be an adverse impact on employees. Alternatively, if the exemption is not revoked, Simmons requests that we investigate the affiliation between CCRC and Seegers.

In support of his position, Simmons submitted statements from a CNW employee; from Dean Foods Company (Dean Foods), one of the two shippers presently served by the line; and from two shippers at Poplar Grove to the west of Chemung. (CNW service west of Cheumg was and continues to be interrupted by a derailment between Chemung and Popular Grove that occurred in the fall of 1986.)

PROCEDURAL MATTERS

On October 13, 1987, Simmons petitioned for the discovery and production of Trust No. 4100, the purchase agreement for the Chemung line, and any other agreements between CNW and CCRC or the Bank with respect to the Chemung line or any other CNW line. Simmons contends that the documents are relevant to defining the relationship between CCRC and Seegers but that CCRC has been unwilling to produce them.

On November 18th, CCRC replied to the discovery petition and requested that its reply be accepted as late-filed. It states that, in the rush of preparing replies to Simmons' previous pleadings, it overlooked the discovery request. Assertedly it replied to the discovery request as soon as it realized the oversight.

CCRC states that it furnished Simmons with a copy of the purchase agreement. However, it argues that there is no valid purpose for the production of the overhead trackage rights and interchange agreement between CCRC and CNW because it has already acknowledged its affiliation with Seegers through common, closely-held stockholders. Similarly, it objects to the production of the trust agreement. It contends that the trust serves a legitimate non-transportation purpose and its production would not add or lead to the discovery of new evidence.

On November 24th Simmons responded, indicating that he would not oppose the late-filed reply as long as his discovery petition could be supplemented with the information attached to his response. The attachments included copies of: the purchase agreement; the trackage rights and interchange agreement; (which, Simmons noted it had obtained from other sources, thus obviating that part of its discovery request); and notices by CNW supervisory personnel indicating that CNW considers the line to have been sold to Seegers. Simmons also attached the statement of a CNW employee concerning traf-

fic being handled on the Chemung line by alleged non-railroad personnel of Seegers. CCRC does not oppose Simmons' November 24th response. Accordingly, we will accept Simmons' evidence and also the late-filed reply of CCRC.

Simmons' discovery request will be denied. To a large extent it has been satisfied as shown by the attachments to the November 25th response. To the extent it has not, Simmons has failed to show how information pertaining to other CNW line segments is relevant to this petition to revoke. Further, Simmons has not shown that an examination of Trust No. 4100 will reveal any relevant facts that are not already of record. CCRC has acknowleged its affiliation with Seegers and indicated that most of the line's traffic will belong to Seegers. The affiliation issue involves an allegation that there will be a concentration of market power in violation of 49 U.S.C. 10101a(13) and the commodities clause, 49 U.S.C. 10746. However, it is unlikely, nor has Simmons shown otherwise, that the language of the trust agreement will provide additional insight into the operational relationship between CCRC and Seegers with respect to either section 10101a(13) or section 10746.

DISCUSSION AND CONCLUSIONS

Efficiency and viability of the CCRC operation. Simmons challenges the viability of CCRC's operations. Asserting that a 3.5-mile rail operation is dubious at best, he suggests that non-Seegers' shippers undoubtedly will receive poorer service and perhaps be subjected to branch line surcharges. He notes that the requirement of a CCRC-CNW interchange is an added cost that will affect viability. Under the rail transportation policy of 49 U.S.C. 10101a, he contends that the burden is on CCRC to demonstrate its viability prior to its "substitution" for profitable CNW operations. Dean Foods also sup-

ports an inquiry into the viability of CCRC's proposed service before the substition is permitted.

The Chemung line was part of a larger rail line extending from milepost 64.0 near Harvard to milepost 87.4 near South Beloit, IL. This line was subject of an abandonent application filed April 21, 1987, in Docket No. AB-1 (Sub-No. 197) *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL.*[2] Because the derailment limited actual rail operations to movements between Harvard and Chemung and between Poplar Grove and South Beloit, CNW was required to and did submit financial operations data for the two line segments as well as data for the Harvard-Poplar Grove segment. Subsequently, however, CNW requested and on August 13, 1987, it was granted permission to withdraw its application.

In the abandonment proceeding, CNW showed that 37 cars were received at Chemung in 1985 and 44 cars were received in 1986. The cars were received by two shippers: Dean Foods, a receiver of plastic pellets used in the manufacture of containers, and McHenry FS, Inc./Growmark, Inc. (McHenry FS) a receiver of materials used to operate a fertilizer blending plant. In addition, the line had an actual operating profit of $14,438 and $21,334, respectively, in 1985 and 1986. A lower estimated base year operating profit of $5,025 was attributed to increased maintenance expenditures

[2]The line also was the subject of a previous abandonment application in Docket no. AB-1 (Sub-No. 116F), *Chicago & N.W. Transp. Co. — Aband. — in McHenry, Boone, and Winnebago Counties, IL*, filed March 31, 1981. That abandonment was contingent on CNW obtaining trackage rights over the line owned by Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) between Beloit and Clinton Junction, WI. When Milwaukee decided to abandon the Beloit-Clinton Junction line, CNW requested and on July 21, 1981, was granted permission to retract its abandonment application.

deemed necessary to keep the line at a FRA Class I operating level. Although the consideration of opportunity costs in each of these time frames would have resulted in avoidable losses, CCRC emphasizes that the Chemung line operated profitably on relatively small amounts of traffic. Assertedly, 1,000 additional carloads will be generated from Seegers' two on-line facilities and this new traffic will more than absorb the added interchange costs between CCRC and CNW and result in profitable operations. CCRC also disputes the contention that short-line operations are inherently inefficient and notes that Simmons failed to show why the CCRC line will not be efficient.

In promulgating our rules governing the notice of exemption procedures, we specifically rejected a requirement for the submission of the type of detailed financial and operating data that is required under 49 CFR 1150.4, 5, and 6. *See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986) (*Exemption*). Essentially, we reviewed our experience with the many individual exemption proceedings we had decided and concluded that the vast majority had been processed with far less financial and operating information to the apparent satisfaction of the parties. *Id.* at 812-813, and 817.

Here Simmons has not provided specific evidence to support his challenge to CCRC's viability and there is no evidence before us suggesting that CCRC will not be viable, financially or otherwise. Rather, the evidence shows that the line is earning an operating profit, notwithstanding its low traffic volume, and that the traffic volume will increase, perhaps significantly. Simmons does not dispute CCRC's contention that it will carry an increased traffic volume. To the contrary, he implicitly appears to accept these projections when he argues that the increased traffic volume, resulting from the relationship between CCRC and Seegers, may adversely affect the line's other shippers.

Simmons states that neither of Seegers' facilities are connected to the line by a siding. Seegers has a grain warehouse 100 yards northwest of the line at milepost 66.0 and an elevator 400 yards southeast of the line at milepost 65.0. How Seegers plans to reach the line from these facilities is not shown on the record. It is clear, however, that it intends to use the line heavily.

In his September 21st petition, Simmons states that CCRC has no locomotives or car equipment in the area and questions how it will provide service. This statement was made only 6 days after the purchase agreement was executed. It is contradicted by later evidence submitted by Simmons showing that service to Dean Foods and McHenry FS has continued. Apparently rail service is being performed by Seegers' personnel temporarily until CCRC becomes fully operational. We note that CCRC has already been substituted for CNW in the applicable tariffs. For the long term, the issue of whether CCRC will provide service by purchasing or leasing equipment or by contracting for an operator is a matter left to its own managerial discretion.

Simmon's generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line. Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line's shippers.

Impact on shippers west of Chemung. Simmons asserts that shippers west of Chemung will be affected adversely by a more circuitous routing to Chicago and that CNW will lose any incentive it might have had to repair the line segment between Poplar Grove and Chemung. As a consequence, Poplar Grove

traffic allegedly will not be able to be routed to Chicago over the more direct CCRC routing.

Shippers at Poplar Grove generated 21 and 24 carloads, respectively, in 1985 and 1986. CNW's calculations show that, if Poplar Grove had been served from Harvard, the Poplar Grove to Chemung segment would have produced operating losses of $12,017 in 1985 and $18,021 in 1986. Operation of the Poplar Grove to South Beloit portion of the line would also have resulted in operating losses of $19,421 in 1985 and $26,361 in 1986. For base year 1987, the operating loss on the Poplar Grove-Chemung segment would have been $65,901, and the loss on the Poplar Grove-South Beloit segment would have been $82,628. In view of these unfavorable financial projections, it is unlikely that CNW would have much incentive to repair the Poplar Grove-Chemung segment regardless of whether the Harvard-Chemung segment were sold.[3]

Only three shippers at Poplar Grove expressed any interest in either the earlier abandonment proposal or the proposed acquisition by CCRC. Boone County Service Company (Boone), an affiliate of Growmark and the operator of a fertilizer blending plant, received 20 carloads of fertilizer materials in 1985 and 22 carloads in 1986. Edenfruit Products Company (Edenfruit), a food processor, generated no traffic in 1985 and received one carload in 1986. McLay Grain Company (McLay) operates a grain elevator at Poplar Grove but has used motor carriage exclusively since 1975. If the derailment is not repaired, their Chicago traffic, to the extent there is any, would be routed through Beloit and Clinton Junction to Harvard. This would add approximately 32 miles to their Chicago routing. Neither they nor Simmons has shown that this modest increase

[3]Other remedies are more appropriate should shippers seek to enforce CNW's common carrier obligation. *See* 49 U.S.C. 11101(a) and 11701(a).

in mileage would jeopardize in the least the quality of service to Poplar Grove Shippers.

Impact on Chemung Line shippers. Simmons suggests that the acquisition will adversely affect Dean Foods. He contends that, since Seegers does not have private sidings, it will use the CCRC line to load its grain cars. Assertedly this will prevent access to Dean Foods' siding. This concern does not appear to be shared by Dean Foods. Its opposition appears to be based on the viability of the new line and loss of service by CNW; it said nothing about access. Nor do we see an access problem. To the contrary, the evidence shows that since November 25, 1987, Dan Foods had received at least three rail shipments via CCRC. We are not aware of any other way that the acquisition would adversely affect any on line shippers. We have received no complaints in this regard.

Concentration of market power. Relying on 49 U.S.C. 10101a(13), Simmons contends that Seegers' control of CCRC will result in a concentration of market power that would adversely affect rival grain elevators at Clinton, South Beloit, and Poplar Grove. Simmons refers to only two competing grain shippers, McLay of Poplar Grove and Demeter of South Beloit, and we are not aware of any others. Simmons provides no information about Demeter. As to McLay, Simmons submitted a verified statement from Docket No. AB-1 (Sub-No. 197) where McLay expressed concern that it would suffer a competitive disadvantage if Seegers acquired the Chemung line while it was confined to truck service.McLay indicated that it would like to resume shipping grain by rail if it could obtain competitive rates and that in June of 1986 it requested multicar grain rates from CNW. CNW apparently obliged, but for unrelated reasons McLay was unable to begin using rail service. McLay renewed its objections here.

If Simmons is arguing that market power will be concen-

trated in Seegers, his argument is misplaced. Section 10101a(13) of the rail transportation policy is directed at market power of carriers, not shippers. Simmon's novel interpretation of section 10101a(13) would literally preclude shippers from acquiring rail lines, even lines that are slated for abandonment, if there are competing shippers in the vicinity who do not own their own carrier. While every case must be reviewed on its own merits, we cannot agree that this was the intention or even an implication of section 10101a(13). To the contrary, as demonstrated by 49 U.S.C. 10905, the public interest is better served if a line that is proposed for abandonment is acquired (by a shipper or other responsible person), rail operations do not violate the statute. *See also* 49 U.S.C. 10910 and 49 CFRT 1150.21.

In any event, even if Seegers' market power were a relevant concern here, it is unclear how Seegers' relationship to CCRC will result in a concentration of market power vis-a-vis its competitors to the west. These competitors all appear to be served directly by CNW and are dependent on CNW for competitive rates to Chicago. This is also true of Seegers, notwithstanding its relationship with CCRC. CCRC is also dependent on CNW to adopt and publish the joint, proportional or combination rates that will permit its grain traffic to move to Chicago. Moreover, CCRC's rates must cover its operating costs, and Seegers will have the additional expense of loading rail cars without the convenience of direct access. On balance, we do not see how Seegers will obtain market power over its competitors.

To the extent Simmons is arguing that market power is being concentrated in CCRC, we must also disagree. It is unclear how a carrier with a 3.5-mile line can exercise market power over shippers it does not reach. Nor can we agree with Simmons that the mere selection of the name Chicago-Chemung

Railroad Corporation by itself suggests the new carrier has additional expansion plans that would further the concentration of market power. This allegation is entirely speculative and was denied by CCRC. In any event, any further acquisitions would also be subject to Commisison review.

Commodities clause. In response to Simmons' allegations relating to concentration of market power and unfairness to competing elevators west of Chemung, we noted in our September 29th decision denying the stay that his revocation request had not shown nor was their reason to suspect that CCRC would discriminate against other affected shippers. Nevertheless, we stated that in connection with Simmons' petition for revocation and investigation we would review Seegers' relationship with CCRC as it pertains to section 10746.

The mere ownership of a railroad by its principal on-line shipper is not prohibited by statute. *See United States v. Lehigh Valley R. Co.*, 200 U.S. 257 (1911). For there to be a violation, it must be shown that CCRC is operating as an "alter ego" of *Seegers. United States v. South Buffalo Ry. Co.*, 333 U.S. 771 (1948).

CCRC acknowledges its affiliation with Seegers through a small group of common stockholders. It observes that no contention has been made that section 10746 will be violated by the affiliation and asserts that a contention of this nature would not be warranted because the affiliated entities will retain their own corporate identities.

Simmons refers to Docket No. 30891, *Paducah & Louisville Ry., Inc. Acq. & Oper. Exemp. — Illinois Cent. G. R. Co.* (not printed), served May 11, 1987 (*Paducah*) where an alleged commodities clause violation is being investigated, but his opposition to this acquisition is based primarily on the alleged

violation of section 10101a(13). His petition neither asserts nor contains any evidence to suggest that the separate corporate identities of these affiliated entities will be breached. Simmons' showing in support of the requested investigation is limited to his allegation that CCRC and Seegers have common stockholders and share the same address, and a memorandum from a CNW roadmaster and a general order from a CNW division manager, both advising rail personnel that the Chemung line was sold to Seegers. Moreover, his discovery has not elicited any information that would shed further light on this issue. In contrast to *Paducah*, where a shipper on the acquired line competes with the shipper affiliate of the carrier and raised this issue on its own behalf, we can find no indication of record to suggest that there is a possible section 10746 violation with respect to this transaction, and no basis to institute an investigation in this regard.

Impact on labor. As a further ground for revocation, Simmons argues that the transaction will result in CNW personnel losing employment without being accorded protection. However, even if CCRC were required to file an application under section 10901, CNW personnel would not necessarily be entitled to employee protection. The imposition of labor protection under section 10901 is discretionary. We have a long recognized and judicially approved policy of not imposing labor protection in fledgling carriers. The financial burden associated with their institution of new operations should not be exacerbated by costly labor protection provisions. *See CMC Real Estate Corporation v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986). In the absence of exceptional circumstances, we do not impose these costs upon either the buyer or the seller. *Exemption, supra*, at 815; *Northwestern Pacific Acquiring Corp. and Eureka S. R. Co. — Exemp. from 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988; and Finance Docket No. 31205, *FRVR Corp. — Exemption Acq. and Oper.*

— *Certain Lines of C&NW Transp. Co. — Pet. for Clarification* (not printed), served January 29, 1988. Simmons has neither alleged exceptional circumstances nor presented any facts to suggest that they may exist.

This action will not significantly affect either the quality of the human environment or energy conservations.

It is ordered:

1. The request for discovery, to the extent materials have not already been provided, is denied.

2. The petition to revoke or, in the alternative, to investigate is denied.

3. This decision will be effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett was absent and did not participate in the disposition of this proceeding.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMERCE COMMISSION

DECISION

SERVICE DATE
SEP 16 1988

Finance Docket No. 31110

CHICAGO-CHEMUNG RAILROAD CORPORATION — EXEMPTION, ACQUISITION AND OPERATION — RAIL LINE OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY BETWEEN HARVARD AND CHEMUNG IN MCHENRY COUNTY, IL

Decided: September 12, 1988

Petitioner, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, seeks reopening of our March 18, 1988 decision in this proceeding, on the basis of material error. That decision denied Simmons' request to revoke or, in the alternative, to investigate the notice of exemption filed September 16, 1987, by Chicago-Chemung Railroad Corporation (CCRC), under 49 CFR 1150.31, *et seq.* CCRC filed the notice of exemption to acquire and operate a 3.5-mile line of the Chicago and North Western Transportation Company (CNW) from milepost 64.0 near Harvard, IL, to milepost 67.5 near Chemung, IL, and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5. This line segment is part of a longer line extending west from Harvard beyond Chemung to Poplar Grove and South Beloit, IL. A derailment between Chemung and Poplar Grove in the fall of 1986 interrrupted CNW service west of Chemung up to the time the notice of exemption was filed.

Simmons' petition to revoke the exemption focused primarily on the viability of the operation CCRC had proposed. He con-

tended that (1) operation would be inefficient; (2) shippers located west of the line would be adversely affected; (3) market power would be concentrated in the hands of a single grain company (Seegers Grain, Inc.) that would control CCRC; and (4) there would be an adverse impact on employees.

In denying Simmons' petition, we addressed all of these points. We concluded that Simmons had failed to support its viability charge with specific evidence, and that the evidence of record indicated the line was earning an operating profit and would probably experience an increase in traffic volume. Of shippers located west of the line, only three Poplar Grove shippers expressed interest in CCRC acquisition; these had little or no recent rail traffic and would not have been inconvenienced by a slightly longer routing to Chicago, particularly as the Poplar Grove-Chemung derailment might not be repaired. Moreover, we found that considering operations west of Chemung would have produced an operating loss for the longer line. We concluded that it was unclear how Seegers' relationship to CCRC would increase Seegers' market power vis-a-vis its competitors to the west, and that, in any case, the rail transportation policy is concerned with market power of carriers, not of shippers. Finally, we stated that, even if CCRC were required to file an application in lieu of receiving an exemption, we would not have imposed labor protection for CNW employees.

Simmons alleges that we erred in three respects: (1) finding that the segment west of Chemung, to Poplar Grove, was unprofitable; (2) stating, in support of the line's viability, that short line railroads generally provide better service than prior owners; and (3) denying his discovery request regarding the relationship between CCRC and Seegers. He asks that we reopen the decision, grant discovery, issue amended findings, and revoke the exemption or institute an investigation.

In reply, CCRC urges denial of the petition to reopen. It states that, under 49 U.S.C. 10505(d), an exemption cannot be revoked except on a finding that application of a provision of 49 U.S.C. Subtitle IV is necessary to carry out the transportation policy of section 10101a. CCRC alleges that Simmons' first two points have no bearing on the propriety of revocation and that discovery would not have produced relevant information not already admitted by CCRC.

Profitability of the Chemung-Popular Grove segment. In his petition to revoke, Simmons argued that shippers west of Chemung would suffer because sale of the Harvard-Chemung line would eliminate any incentive for CNW to repair the line segment between Chemung and Poplar Grove. We concluded that the line segment from Harevard to Poplar Grove would be unprofitable, and therefore that CNW would be unlikely to make the repairs and continue service to Poplar Grove even if Harvard-Chemung segment were not sold.[1]

Simmons argues that we erred in our method of calculating the unprofitability of the Chemung-Poplar Grove segment. He notes that CNW had not calculated separately the financial data reflecting the theoretical operation of the Poplar Grove-Chemung segment. Accordingly, he objects to the use of financial results for that segment that, in his view, were determined merely by subtracting from the smaller Harvard-Poplar Grove profits the Harvard-Chemung profits, thereby indicating a loss for the Poplar Grove-Chemung segment. He also faults

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[1]The financial data were taken from Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL*, in which CNW sought to abandon its line between Harvard and South Beloit, IL. CNW was required in that proceeding to submit financial operations data for segments between Harward and Chemung, Harward and Poplar Grove, and Poplar Grove and South Beloit. That application, which was filed April 21, 1987, subsequently was withdrawn by CNW.

our consideration of the projected operating results for 1987, including the normalized maintenance estimate for that year. Simmons claims that the Harvard-Poplar Grove operations are profitable but that this viable service is being undercut by the sale of the Harvard-Chemung segment.

Although operations between Harvard and Poplar Grove were profitable in 1985 and 1986, the profitability was attributable to Chemung traffic rather than Poplar Grove traffic. Traffic moving beyong Chemung to Poplar Grove produced revenues that were less than the additional costs of operation attributable to that traffic. The only reasonable assessment is a comparison of the Harvard-Chemung operating results with those of the Harvard-Poplar Grove segment. Contrary to Simmons' assertion, we did not merely subtract the Harvard-Chemung profits from the Harvard-Poplar Grove profits. Our analysis was a rational examination of the traffic and financial data of the two segments.

In 1985, traffic moving on the Harvard-Poplar Grove segment amounted to 58 carloads (including 37 carloads that stopped at Chemung). The 58 carloads produced revenues of $51,332, and, adding $985 in other revenues, the Harvard-Poplar Grove line had total revenues of $52,317. The 37 carloads that were delivered at Chemung produced revenues of $41,330, and other revenues of $985 increased total revenues to $42,315 for the Harvard-Chemung portion of the Harvard-Poplar Grove line. Thus, the 21 cars that moved from Harvard, through Chemung, to Poplar Grove produced revenues of $10,002.

The avoidable costs associated with operation of the Harvard-Poplar Grove segment totaled $49,896, of which $27,877 were attributable to the Harvard-Chemung poriton of the line. This means that operation of the portion of the Harvard-Poplar Grove line beyong Chemung had avoidable

costs of $22,019. Therefore, CNW's operation of the line beyond Chemung, to Poplar Grove, resulted in revenue of $10,002, but its avoidable costs were $22,019. Consequently the operation beyond Chemung resulted in an operating loss of $12,017 in 1985. A similar analysis for 1986 showed an oper ating loss of $18,021 for the Harvard-Poplar Grove operation beyond Chemung.[2] Moreover, it was not improper to consider the projected 1987 operation of the Chemung-Poplar Grove portion of the line, including the cost of necessary increased maintenance, because it provides an indication of what CNW would be required to spend to continue the Poplar Grove operation.

Simmons also alleges that CNW has twice failed in attempts to abandon the Harvard-South Beloit line. He contends that the line is viable but that the sale of the Harvard-Chemung portion to CCRC threatens that viability. Simmons is in error on both points.

As noted in the prior decision, CNW requested and was granted permission to withdraw its application in both previous abandonment proceedings. No decision was reached as to whether the public convenience and necessity permitted abandonment of the line. Nevertheless, CNW's evidence indicated that the Harvard-South Beloit line had operating losses in 1985 and 1986 and the unprofitability was exacerbated by the substantial economic costs. Simmons offered no figures to contradict those of CNW on this issue.

General success of short line operations. In answer to questions raised by Simmons as to the likelihood of CCRC succeeding with its 3.5-mile operation, we pointed out that the

[2]These avoidable cost/operating loss figures only represent part of a carrier's cost. Other costs may include normalized maintanance and opportunity costs.

history of short line operations indicates that these carriers generally are successful and typically provide improved service to shippers. Simmons challenges this conclusion, stating that he knows of no statistical study justifying that finding. We did not assert that our statement was based on statistical analysis. In part, that conclusion rests upon our experience in reviewing short line sales by cariers (usually class I railroads) seeking to divest themselves of the lines and new entities (usually new entities that become class III carriers upon the acquisition of the line) that desire to acquire and operate them. It is also based on the comments of the users of the line in those cases. These shippers and receivers usually support the acquisition, often on the stated expectation of receiving better service or at least avoiding abandonment. Most of the opposition to short line sales has come from rail labor, rather than from the users of the lines involved.

In addition, the Commission has conducted a study of the acquisition of short lines by new operators. That study entitled New Short Line and Regional Railroads, was issued on September 1987, and was the subject of Chairman Gradison's testimony, given October 20, 1987, before the Subcommittee on Surface Transportation of the U.S. Senate Committee on Science, Commerce, and Transportation. The study, prepared by the Commission's Office of Transportation Analysis (OTA), suyrveyed all 183 short line carriers then in existence, 30 of which operated 5 miles or less. The vast majority of these small carriers anticipated positive future propsects for viability. Among the reasons they gave were (1) development of new business, (2) effective marketing, and (3) services tailored to shippers' needs. This study is available to the public.

In any event, our references to our experience with short line railroads were made only as a response to Simmons'

generalized challenge to the viability of a 3.5-mile line. They did not form the principal support for our finding that this particular line would be viable.

Discovery. Simmons requested discovery of certain materials that he alleged would help define the relationship between CCRC and Seegers. As indicated above, Simmons argued that Seegers' control of CCRC would create undue concentration of market power. We denied Simmons' discovery request because CCRC had already acknowledged that it was closely affiliated with Seegers, which will be the chief shipper on the line. We concluded that Seegers' close relation with CCRC would not create a potential for an abuse of market power from CCRC's operation of the line, and, therefore, that discovery would not produce information leading to a different conclusion with respect to market power.

Simmons contends that we erred in denying his discovery request, because he was unable to determine who actually owns and controls the line. He also argues that the denial undercuts our findings of no potential abuse of market power. Simmons raises no new argument here. CCRC's admission of close affiliation with Seegers obviates requiring production of evidence that would lead to the conclusion that a control relationship exists. Simmons' argument about abuse of market power ignores our conclusion that Seegers' competitors are not located on the Harvard-Chemung line and would not be dependent on CCRC's service.

Since Simmons has not shown that our decision of March 18, 1988, contains material error, his petition to reopen will be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The request for reopening is denied.

2. This decision will be effective on it service date.

By the Commission, Chariman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Simmons did not participate in the disposition of this proceeding.

(SEAL)

Noreta R. McGee
Secretary

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
NOV 10 1988

DECISION

Docket No. AB-1 (Sub-No. 221X)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY — ABANDONMENT EXEMPTION — BOONE COUNTY, IL

Decided: November 10, 1988

The Chicago and North Western Transportation Company (CNW) filed a notice of exemption on September 26, 1988, under 49 CFR 1152 Subpart F — *Exempt Abandonments*, to abandon its 6.5-mile line of railroad between milepost 67.5 near Chemung and milepost 74 near Poplar Grove, in Boone County, IL.[1] The notice of exemption was served and published in the *Federal Register* on October 14, 1988 (53 FR 40281) and, unless stayed, is scheduled to become effective on November 13, 1988.

On October 24, 1988, a petition to stay was filed jointly by McLay Grain Company (McLay); Edenfruit Products Company (Edenfruit); and Patrick W. Simmons, Illinois Legislative Director for United Transportation Union (Simmons) (collectively petitioners).[2] Petitioners filed a petition for reconsideration and/or revocation of the exemption on November 3, 1988. CNW replied to the stay petition on October 31, 1988.

[1]This line is a part of a 23.4-mile rail line extending from milepost 64.0 near Harvard, IL, westerly through Chemung and Poplar Grove, to milepost 87.4 near South Beloit, IL. In November 1986, direct service between Harvard and Poplar Grove was terminated as a result of a derailment between Chemung and Poplar Grove.

[2]The Village of Poplar Grove (Village) originally joined with petitioners but later submitted a withdrawal notice attributing its former inclusion to a misunderstanding.

To justify a stay, petitioners must demonstrate: (1) that there is a strong likelihood that they will prevail on the merits; (2) that they will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by issuance of a stay; and (4) that the public interest supports the granting of the stay. *See Washington Metropolitan Area Tourist Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Petitioners have not demonstrated the requisite justification for a stay under the above criteria. Their petition will be denied.

Petitioners argue that they are likely to prevail on the merits of their administrative appeal and that the notice of exemption will be revoked. Their argument is not persuasive. Petitioners argue that the criteria for an out-of-service line exemption are not justified because Poplar Grove shippers opposed CNW's attempt to abandon its entire Harvard-South Beloit line in 1987.[3] Assertedly, their opposition in 1987 should be viewed as outstanding complaints here and as such should preclude CNW's use of the class exemption.

At issue here is the much shorter 6.5-mile line between Chemung and Poplar Grove. It has been out of service for the requisite 2-year period and therefore meets the basic class exemption criteria. To qualify for the class exemption there can be "no formal complaint filed by a user of rail service on the line . . . regarding cessation of service over the line, 49 CFR 1152.50(b). However, a qualifying complaint must allege that the "carrier has imposed an illegal embargo or other unlawful impediment" to service. No such allegation was made in the shipper protests in Docket No. AB-1 (Sub-No. 197) which petitioners ask to be viewed as complaints. Indeed, peti-

[3]Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband. — In McHenry, Winnebago and Boone Counties, IL.*, filed April 21, 1987, and withdrawn August 13, 1987 (Sub 197).

tioners concede that, when service on the Poplar Grove-Chemung segment was interrupted, CNW acted promptly to provide service via an alternate route.

Petitioners argue that CNW is abusing the out-of-service class exemption because the railroad is exercising it as part of a broader strategy to abandon its entire Chemung-South Beloit line. To the contrary, it is fully consistent with the rail transportation policy, 49 U.S.C. 10101a, to permit CNW to segment its lines and first move forward with the abandonment of those that are the least profitable, such as the one that has been out of service. Indeed, the courts have compelled this approach on judicial review. *See Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098 (7th Cir. 1982).

Petitioners also argue that the Commission's Environmental Assessment is faulty. However, petitioners' quarrel goes merely to the approach that the Commission followed. They do not argue that the Commission has failed to take the requisite hard look at the environmental consequences of abandoning the 6.5-mile segment. While petitioners argue that the Commission should have focused on the environmental effects of abandoning the entire Chemung-South Beloit line, the broader abandonment is not before the agency. At this point, it is speculative whether CNW will file an applicaton to abandon the Poplar Grove-South Beloit segment or whether the Commission will eventually authorize its abandonment. Moreover, if the South Beloit-Poplar Grove abandonment is filed and it is determined that it has environmental implications that carry over to the area between Chemung and Poplar Grove, they can be addressed in that proceeding, *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). Accordingly, it is not likely that petitioners will prevail on the merits.

Although petitioners contend that the failure to stay the exemption will result in irreparable injury, the fact is that there

are no shippers on the line. overhead traffic has not moved over the line since derailment caused the line to be severed east of Poplar Grove, and CNW exercised its managerial discretion to reroute the traffic. It is unclear how Edenfruit and McLay, the only petitioning shippers, would be irreparably injured if the exemption is permitted to become effective. As noted by CNW, McLay has not shipped any traffic by rail since the 1970's and Edenfruit has shipped one car in the last 4 years. Moreover, a decision granting abandonment is not irreversible; parties who proceed with an abandonment assume the risk that the agency decision may be reversed on appeal and that service may have to be restored. *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987).

On the other hand, plainly, CNW would be harmed by a stay. To grant a stay would fly in the face of the Congressional policy (as expressed in the Staggers Act) to expedite abandonments and enable railroads such as CNW to more efficiently allocate their limited resources. *See Busboom Grain Co., Inc, supra*, 830 F.2d at 75. Although it is not incurring operating deficits on the line, CNW continues to incur opportunity costs from the inability otherwise to dispose of it. Specifically, the Boone County Conservation District is seeking to acquire the right-of-way for other public purposes, and CNW seeks to use the track to repair and rehabilitate other lines in its system. Until the abandonment is consummated, CNW may not benefit from either of these opportunities.*See Abandonment of Railroad Lines — Use of Opportunity Costs*, 360 I.C.C. 571 (1979), *aff'd., Farmland Industries, Inc. v. United States*, 642 F.2d 208 (7th Cir. 1981).

Petitioners contend that the public interest warrants a stay. Assertedly a denial of the stay request would prejudice both the judicial review petitioners allegedly intend to seek with regard to our decision authorizing the sale of the Harvard-Chemung segment of the line, Finance Docket No. 31110,

Chicago-Chemung R. Corp. — Exemp., Acq. and Oper. — Line of C. & N.W. Transp. Co. Betw. Harvard and Chemung in McHenry Cty., IL (not printed), served March 18, 1988, *aff'd.*, September 16, 1988, stay denied September 29, 1988 (*Chemung*) and the allegedly forthcoming abandoment of the Poplar Grove-South Beloit segment.

Petitioners' public interest arguments are not persuasive. This abandonment was properly filed under the Commission's class exemption procedures for out-of-service rail lines at 49 CFR 1152. In its class exemption decision, the Commission has already balanced the various public interest issues and come down in favor of exempting out-of-service rail lines. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1987), *aff'd., Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988). Petitioners have offered no argument here , public interest or otherwise, that warrants upsetting the balance struck by the Commission in its class exemption.

It is unclear how judicial review in the *Chemung* case would be prejudiced. *Chemung* is an acquisition. It must stand on its own merits; it is not dependent on CNW's continued operation of the entire South Beloit-Harvard line. Even in the unlikely event that our decision in *Chemung* were to be reversed, the abandonment of this unused 6.5-mile segment would not be precluded. Petitioners have not presented cogent public interest reasons to stay it. Similarly, it is unclear how the exemption of this out-of-service line will prejudice our decision if CNW does seek to abandon the South Beloit-Poplar Grove segment. Overall, we find that the public interest does not support a stay.

It is ordered:

1. The request for stay is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Lamboley dissented with a separate expression. Commissioner Simmons did not participate in the disposition of this proceeding.

(SEAL) Noreta R. McGee
Secretary

COMMISSIONER LAMBOLEY, dissenting:

I would grant the petition for stay.

In my view, this proceeding may be inappropriate for the out-of-service exemption. The actions of CNW itself are responsible for the fact that there has been no service over this line since 1986. Subsequent to a derailment, CNW chose not to repair the line, but instead to operate circuitously over another line to serve shippers from the west instead of from the east. Then CNW strategically further cemented the fragmentation of the Harvard to Poplar Grove subsegment of the line by sale of the Harvard to Chemung portion to a new operator.

These prior actions combined with this notice of exemption may force shippers located at Poplar Grove to face impending abandonment of the circuitous service that they now receive because their traffic cannot support service over the longer (and previously unprofitable segment), when for the years immediately prior to the imposition of this circuitous route, 1985 and 1986, petitioners maintain that there was an operating profit on the Chemung to Poplar Grove segment.[1]

[1]See Petition to Stay, page 2. There is no indication in the record of the present economics of service over this segment, i.e., cost of rehabilitation, maintenance, revenues, etc.

Obviously petitioners would not have filed a complaint for service over the embargoed line when the CNW provided a substitute service. Thus the fact that there has been no traffic over this segment for the last 2 years and no complaint for service is entirely due to the actions of CNW and should not be used to bootstrap this phase of the apparent planned abandonment of the entire line.

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE
MAY 8 1989

Docket No. AB-1 (Sub-No. 221X)

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY — ABANDONMENT EXEMPTION — BOONE COUNTY, IL.

Decided: April 27, 1989

The Chicago and North Western Transportation Company (CNW) filed a notice of exemption on September 26, 1988, under 49 CFR 1152 Subpart F — *Exempt Abandonments,*[1] to abandon its 6.5-mile line of railroad between milepost 67.5 near Chemung and milepost 74 near Poplar Grove, in Boone County, IL. The notice of exemption was served and published in the *Federal Register* on October 14, 11988 (53 FR 40281) and became effective on November 13, 1988.

On November 3, 1988, McLay Grain Company (McLay), Edenfruit Products Company (Edenfruit), and Patrick W. Simmons, Illinois Legislative Director for United Transportaton Union (Simmons) (collectively petitioners) jointly filed a peti-

[1] *See Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) (*Exemption I*); *partially remanded Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986) (*Illinois I*); reconsidered in *Exemption of Out of Service Rail Lines*, 2 I.C.C. 2d 146 (1986) (*Exemption II*); *aff'd Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied* 102 L. Ed. 2d 775 (1989) (*Illinois II*).

tion for reconsideration and/or revocation of the exemption.[2] CNW replied on November 23, 1988. We will deny the petition.

This line is the middle segment of a longer CNW rail line, (one of two routes between Harvard, IL and Beloit, WI), extending from milepost 64.0 near Harvard, IL, westerly through Chemung and Poplar Grove, to milepost 87.4 near South Beloit, IL. The longer line (the southern route) was the subject of two prior abandonment applications, both of which were voluntarily withdrawn by CNW.[3] Petitioners claim that his proceeding is part of a CNW scheme to rid itself of the entire southern Harvard-South Beloit line, which consists of three segments: (1) a 3.5-mile Harvard-Chemung line; (2) this middle segment line between Chemung and Poplar Grove; and (3) the remaining 13.4-mile Poplar Grove-South Beloit line, which is identified on the carrier's system diagram map as a candidate for abandonment.

In November 1986, a derailment occurred between Chemung and Poplar Grove, on the middle segment. Therefore, traffic moving between Harvard and Poplar Grove was routed off the line, westerly to Beloit, WI, and then back over

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[2]On November 10, 1988, we denied a stay petition filed by petitioners, who have sought judicial review of our decision in *Patrick W. Simmons, McLay Grain Company and Edenfruit Products v. Interstate Commerce Commission and United States of America*, U.S.C.A., 7th Cir., No. 88-3211, filed on November 15, 1988. The Village of Poplar Grove, which originally had joined with petitioners, later submitted a withdrawal notice, attributing its former inclusion to a misunderstanding. The court proceeding has been held in abeyance pending the issuance of this decision.

[3]Docket No. AB-1 (Sub-No. 116F), *Chicago & N.W. Transp. Co. — Aband. — in McHenry, Boone, and Winnebago Counties, IL*, filed March 31, 1981, and withdrawn July 21, 1981; and Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL.*, filed April 21, 1987, and withdrawn August 13, 1987.

the northern route through South Beloit to Harvard, adding about 32 miles to the Poplar Grove-Chicago service.

On September 16, 1987, in Finance Docket No. 31110, *Chicago-Chemung R. Corp. — Exemp., Acq., and Oper. — Rail Line of Chicago & N.W. Transp. Co. Between Harvard and Chemung, in McHenry County, IL (Acquisition)*, the Chicago-Chemung Railroad Corporation (CCRC) filed a notice of exemption, under 49 CFR 1150.31 *et seq.*, to acquire and operate the 3.5 -mile segment of the longer line between milepost 64.0 near Harvard and milepost 67.5 near Chemung (and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5).[4]

As grounds for revocation of the abandonment exemption, petitioners contend that the abandonment constitutes market abuse by CNW and that regulation is therefore necessary to carry out the rail transportation policy (RTP) of section 10101a. Pursuant to 49 U.S.C. 10505(d), the Commission may revoke an exemption, in whole or in part, where necessary to carry out the RTP.

Petitioners argue that the carrier's trifurcation of the line will result in market abuse, since the Harvard-Poplar Grove operation was allegedly profitable prior to the derailment.[5]

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[4]On September 29, 1987, Simmons' request to stay the acquisition exemption was denied; on October 28, 1987, his request to reopen the stay denial was denied; on March 18, 1988, his petition to revoke the acquisition exemption was denied; and, on September 16, 1988, his petition to reopen was denied. Judicial review of the Commisson's decisions is pending in *Simmons v. ICC*, No. 88-3207, U.S.C.A, 7th Cir., filed November 15, 1988.

[5]The alleged profitability of the Harvard-Poplar Grove line is based upon data submitted in the Sub-No. 197 proceeding, in which CNW showed that the entire line suffered operating losses of $11,639 in 1985 and $11,968 in 1986. CNW submitted data that showed the Harvard-Chemung operation realized a profit of $14,438 in 1985 and $21,334 in 1986; the Harvard-Poplar Grove operation realized a profit of $3,507 in 1985 and $3,313 in

The present abandonment will leave Poplar Grove shippers with rail service only via the Poplar Grove-South Beloit segment, which CNW already has argued is unprofitable. *See* the application, in Sub-No. 197 and *Acquisition*, March 18, decision, slip op. at p. 4. Therefore, petitioners argue that, although Poplar Grove shippers will be able to protest the possible future abandonment of the Poplar Grove-South Beloit line, if and when an application is filed, they will be penalized by the sequential disposition of the line segments.

Petitioners have not explained how CNW's segmented handling of the Harvard-South Beloit line could subject shippers to a market power abuse here. In *Exemption I*, at p. 892, we concluded that regulation of rail lines that have been out of service for 2 years is not necessary to protect shippers from market abuse, and the court upheld this conclusion in *Illinois II*, 848 F.2d at 1254-55. Market abuse contemplates a carrier's acting to the detriment of shippers where that carrier has a dominant position in the market, but there is ample motor

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1986; and the Poplar Grove-South Beloit operation lost $19,421 in 1985 and $26,361 in 1986.

In *Acquisition*, Simmons argued that the Harvard-Poplar Grove line was profitable but that the sale of the Harvard-Chemung line to CCRC would terminate CNW's incentive to repair the derailment between Chemung and Poplar Grove, thus eliminating access to Poplar Grove via Harvard. As we explained in our March 18 and September 16 decisions in *Acquisition*, the Harvard-Poplar Grove profitability was illusory, since it was the result of Harvard-Chemung traffic. Traffic moving beyond Chemung to Poplar Grove produced operating losses of $12,017 in 1985 and $18,021 in 1986. Since the Poplar Grove-South Beloit line also operated at a loss, it is clear that Poplar Grove traffic produced operating losses, whether the operation was considered in conjunction with Harvard or with South Beloit. The only profitable operation on the Harvard-South Beloit line was the operation between Harvard and Chemung. We concluded that, even if CNW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the money-losing Chemung-Poplar Grove operation.

carrier competition here. In the Sub-No. 197 proceeding, CNW listed 23 regulated motor carriers serving the shippers on the line, and it seems clear that Poplar Grove shippers are using these motor carriers to full advantage. McLay has not used CNW since the 1970's, and Edenfruit has shipped only one carload in the past 4 years. Petitioners claim that there are other Poplar Grove shippers that will be affected, but none of these shippers has opposed this abandonment. This suggests that they do not feel the need for reinstitution of service on the line to the extent petitioners contend. *See Exemption II*, 2 I.C.C.2d at 156, and *Illinois II*, 848 F.2d at 1254-55.

In addition, petitioners ignore the fact that CNW does no longer have a line between Harvard and Chemung since its sale to CCRC. It is difficult to see how CNW can abuse a market on a line which it no longer owns or operates. In sum, we find no merit to petitioners' market abuse assertion.

Furthermore, petitioners argue that CNW's use of the class exemption to abandon 6.5 miles of the 19.9-mile South Beloit-Poplar Grove line is an abuse of the class exemption procedures. They assert that, since CNW's ultimate plan is to rid itself of the entire Harvard-South Beloit line, we should revoke the consummated sale to CCRC,[6] and consider its disposition together with the proposed abandonment, on a consolidated basis. This we will not do. In rationalizing its system, a carrier may ordinarily select the means best suited to its needs and which will produce the most benefits, and it may generally choose the sequence and timing of its requests for approval. Having found a willing purchaser for the profitable

[6]Petitioners present no basis for their contention that we should revoke the exemption in *Acquisition*. The merits of that exemption were fully discussed in prior decisions and need not be reviewed again. Moreover, this abandonment proceeding is not the proper forum for further review of the *Acquisition* exemption.

Harvard-Chemung line, CNW was free to sell that line, subject to our review.

Nor will we consider the potential abandonment of the Poplar Grove-South Beloit line before an application (or exemption request) has been filed. In the November 10 stay denial, we rejected petitioners' argument that CNW is abusing the class exemption because it was part of its broader strategy to abandon the entire Chemung-South Beloit line. We noted that it is fully consistent with the RTP to permit a carrier to segment its lines and first move forward with the abandonment of those that are the least profitable, slip op. at 2.[7] Petitioners' position would require a carrier to continue operating a clearly unprofitable and, as here, unused and unneeded portion of a line while it decided if, and when, it will seek to abandon the remaining line segment. Such a requirement would foster a wasteful use of carrier resources, which clearly is contrary to the RTP.

Petitioners allege further that regulation of this abandonment is necessary to carry out other aspects of the RTP.[8] They contend that routing Poplar Grove traffic via South Beloit is "vastly circuitous" since it is three times longer and contravenes the RTP goals of: safe and efficient transportation [section 10101a(3)]; sound transportation [section 10101a(4)]; sound economic conditions [section 10101a(5)]; efficient management [section 10101a(10)]; and energy conservation [section 10101a(15)].

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[7]This approach has been consistently judicially endorsed. *See, e.g., People of State of Illinois v. ICC*, 751 F.2d 903, 904-05 (7th Cir. 1985); *People of State of Illinois v. ICC*, 615 F.2d 743, 749 (7th Cir. 1979); *People of State of Illinois v. ICC*, 604 F.2d 519, 528 (7th Cir. 1979). *See also Indiana Sugars, Inc. v . ICC*, 694 F.2d 1098, 1101 (7th Cir. 1982) (court recognized efficacy of line segmentation for abandonment purposes).

[8]We have already concluded, with affirmance of the court, that regulation of lines that have been out of service for at least 2 years is generally unnecessary to carry out the RTP.

The 32-mile circuity is not excessive and petitioners have not presented any justification for their assertion that the existence of such circuity in and of itself is sufficient to require revocation of the exemption as contrary to RTP goals.[9] To the contrary, repairing the derailment and reinstituting the money-losing Chemung-Poplar Grove operation would seem to be neither an efficient use of carrier resources nor good management; nor is it necessary to foster sound transportation or sound economic conditions in transportation. Even if the circuitous route were assumed to be somewhat less energy efficient (and we have no evidence so to find), the other RTP considerations addressed above which militate against reinstitution of the Chemung-Poplar Grove operation would outweigh any extra energy use connected with operating over the South Beloit alternate route. Moreover, cumulating traffic over one of two routes between two points creates certain economic efficiencies even if the route selected is the longer of the two.

Finally, petitioners raise two procedural matters. First, they contend that use of the class exemption is inappropriate here because, they allege, there have been complaints filed within the past 2 years. They are in error. The "complaints" to which petitioners refer are the protests filed in the Sub-No. 197 abandonment proceeding. Under 49 CFR 1152.50(b), a railroad may use the class exemption, if "no formal complaint filed by a user of rail service on the line . . . .regarding cessation of service over the lines either . . . is pending with the Commission or any United States District Court. . . ." These com-

[9]The circuity issue was raised by Simmons in *Acquisition*, but we concluded that neither the shippers (McLay, Edenfruit, and Boone County Service Company) nor Simmons had shown that the increased mileage would jeopardize the quality of service on Poplar Grove traffic. *See* March 16 decision, slip op. at 4. We also note that a route involving CCRC would require two interchanges. Petitioners have not submitted any energy data regarding the interchanges, and thus overstate any potential energy loss due to circuity.

plaints must have specifically alleged that the "carrier has imposed an illegal embargo or other unlawful impediment to service." 49 CFR 1152.5©(b).

There have been no such formal complaints filed here alleging an illegal embargo or other unlawful impediment to service. As the record shows, and petitioners acknowledge, CNW has continued to serve Poplar Grove via South Beloit after the derailment.

Nor were such allegations made in the shipper protests filed in the Sub-No. 197 proceeding. Rather, the shippers objected to a proposed cessation of existing service over the entire Harvard-South Beloit line. Since the abandonment application was withdrawn, these objections cannot be viewed as pending complaints. Therefore, we reject petitioners' suggestion that they should be viewed as constructive complaints because it would have been redundant for shippers to have filed complaints with the Commission together with the protests filed in the abandonment proceeding.

As a second procedural issue, petitioners argue that the environmental assessments (EAs) issued by our Section of Energy and Environment on October 24 and 31, 1988,[10] should not have been limited to the Chemung-Poplar Grove segment, but should have evaluated the environmental efffects associated with abandonment of the entire Chemung-South Beloit line.[11]

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[10]In a decision served November 13, 1988, the proceeding was reopened for imposition of environmental conditions and a 180-day public use condition.

[11]Petitioners cite four cases in support of their argument: *Swain v. Brinegar*, 542 F.2d 364, 370 (7th Cir. 1976); *Patterson v. Exon*, 415 F. Supp. 1276, 1283-85 (D. Neb. 1976); *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); and *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987). In all four decisions cited by petitioners, the courts have recognized that segmentation *is* appropriate in certain circumstances, where four factors are satisfied. *See Swain*, 542 F.2d at 369; *Patterson*,

Under the National Environmental Policy Act, the Commission is required to consider the environmental consequences of licensing proposals, such as abandonment requests, submitted for approval. In *Kleppe v. Sierra Club*, 427 U.S. 390, 414 n.26 (1976), the Court recognized that a federal agency may approve a single pending application without first completing a comprehensive impact statement on all environmentally interrelated regionwide proposals. Approval of one application does not commit the agency to approval of any others, and the agency can take into consideration the environmental effects of that application when reviewing the cumulative impact of the remaining proposals. *See id.* 414-15 at n.26. *Accord West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n*, 701 F.2d 632, 651 (7th Cir. 1983). Consequently, we find that it is not necessary here to analyze the environmental effects of the potential larger abandonment in order to evaluate adequately the environmental impact of abandoning the Chemung-Poplar Grove segment now before us.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for reconsideration and revocation is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice

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415 F. Supp. at 1283; *Daly*, 514 F.2d at 1111; *Taxpayers*, 819 F.2d at 299. Three of the factors are satisfied here: (1) the proposed segment has logical termini; (2) it is substantially independent in terms of its utility; and (3) allowing its abandonment does not foreclose the opportunity to consider an alternative treatment of subsequently proposed segment abandonments. The fourth factor — whether the decision irretrievably commits federal funds to closely related projects — is not applicable.

Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN SIMMONS, dissenting:

Revocation of the out-of-service exemption for this track segment is appropriate and necessary in light of the fact that CNW apparently will abandon the rest of the line. Therefore, I would grant the petition without prejudice to CNW filing an individual abandonment application or petition for exemption and address the impact of the abandonment of this segment on the remaining line. Petitoners have raised significant public interests issues which should be explored further, particularly CNW's failure to repair the damaged segment and its selling of another portion of the line.

COMMISSIONER LAMBOLEY, dissenting:

I would grant the petition for revocation. As I stated in my dissenting separate expression to the decision denying stay[1], I believe that the out-of-service exemption may be inappropriate in this case.

The actions of CNW itself, in first failing to repair the derailment, then re-routing traffic circuitously over another line, and finally selling the 3.5-mile segment between Harvard and Chemung, made it impossible to reinstitute service on the en-

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[1]Decision not printed, served November 10, 1988.

tire line. These actions have also made it impossible for shippers to oppose the sequence of events which will result, after trifurcation (1. sale, 2. abandonment exemption, and 3. abandonment application), in the abandonment of service by CNW on the entire line for which petitioners maintain there was formerly an operating profit.

I do not believe that CNW should be permitted to bootstrap this phase of the apparent planned abandonment of the entire line.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 2, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

PATRICK W. SIMMONS, MCLAY GRAIN COMPANY and EDENFRUIT PRODUCTS COMPANY, *Petitioners,*	) On Petitions for) Review of the) Orders of the) Interstate Com-) merce Commission.
Nos. 88-3211 & 89-1961 *v.*	)
INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents,*	)
and	)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *Intervenor-Respondent.*	)

ORDER

On consideration of the petition for rehearing and suggestion for reheaing *en banc* filed in the above-entitled cause by Petitioners, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX F

§10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government —

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and eficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) To cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10328(a):

> Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects tose employees

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commisison finds that the application of a provision of this subtitle —

> (1) is not necessary to carry out the transportation policy of section 10101a of ths title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
>
> . . .
>
> (g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 10901. Authorizing Construction and operation of railroad lines

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may

be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

(b)(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interest of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transporttion to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

§ 11347. Employee protective arrangements in transactions involving rail carriers.

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

(3)

No. 90-959

In the Supreme Court of the United States

OCTOBER TERM, 1990

PATRICK W. SIMMONS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
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QUESTIONS PRESENTED

1. Whether a representative of rail labor lacked standing to initiate judicial review of an Interstate Commerce Commission (ICC) order permitting the sale of one rail line and the abandonment of another, because the particular alleged injury to rail employees resulting from the transactions is not within the zone of interests protected by the Interstate Commerce Act.

2. Whether certain off-line shippers lacked standing under Article III to challenge the ICC's order permitting a rail line abandonment, because the alleged injury to the shippers would not be remedied by overturning the ICC's authorization of the abandonment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-959

PATRICK W. SIMMONS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the acquisition case (Pet. App. 3a-11a) is reported at 909 F.2d 186. The opinion of the court of appeals in the abandonment case (Pet. App. 18a-26a) is reported at 900 F.2d 1023. The decisions of the Interstate Commerce Commission (ICC) (Pet. App. 29a-73a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 16, 1990. Petitions for rehearing were denied on August 2, 1990. Pet. App. 12a-13a, 74a. Following extensions of time granted by Justice Stevens (Pet. App. 1a-2a), the petition for a writ of

certiorari was filed on December 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, governs transactions involving the acquisition and abandonment of rail lines. Under 49 U.S.C. 10901, persons seeking to acquire and begin operations over a rail line generally must first obtain the approval of the ICC. Under 49 U.S.C. 10903, a carrier generally may not abandon a rail line without the prior approval of the ICC. Congress has directed the Commission, however, to exempt from regulation transactions that otherwise require approval under the Act when the Commission finds that regulation is not necessary to carry out the national transportation policy and certain other conditions are met. 49 U.S.C. 10505.

Drawing on its authority under Section 10505, the Commission has issued a class exemption that abbreviates the procedures for noncarrier rail line acquisitions. A prospective acquirer must fulfill certain advance notice conditions in order to invoke the class exemption, and the Commission reserves the right to revoke the exemption's applicability to the acquisition of a particular line. See 49 C.F.R. 1150.31-1150.35; *Class Exemption for the Acquisition & Operation Of Railroad Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Acquisition Exemption*); aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987) (Table).

Similarly, the ICC has issued a class exemption abbreviating the procedures for the abandonment of certain presumptively unneeded rail lines. These "out-of-service" lines are ones that have not generated

traffic for at least two years and carry no overhead traffic that cannot be rerouted over other lines. Again, to invoke this exemption, a carrier must fulfill certain advance notice procedures, and the Commission reserves the right to revoke the exemption's applicability to a particular line. *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C.2d 55 (1984), remanded *sub nom. Illinois Commerce Comm'n* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986), revised, *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986) (*Abandonment Exemption*), aff'd *sub nom. Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989); 49 C.F.R. 1152.50.

The Commission is required to impose certain protective conditions for the benefit of employees who are adversely affected by an abandonment, whether the abandonment is allowed under Section 10903 or under the class exemption. 49 U.S.C. 10903(b)(2), 10505(g)(2). Under the statute, these are the same benefits that are required for carrier consolidations that are governed by 49 U.S.C. 11343 (including the acquisition of an active rail line by an existing rail carrier). But for acquisitions governed by Section 10901 (including noncarrier acquisitions), the statute does not require labor protection for affected employees; instead it leaves it to the ICC's discretion whether to impose labor protective conditions. 49 U.S.C. 10901(e), 10505(g)(2); see *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2590 (1989). The ICC's policy is not to impose protective conditions on noncarrier line acquisitions unless exceptional circumstances warrant them. *Acquisition Exemption*, 1 I.C.C.2d at 815.

2. a. Relying on the procedures set forth in *Acquisition Exemption*, the Chicago Chemung Railroad

Corporation (CCRC) acquired a 3.5-mile rail line between Harvard and Chemung, Illinois, from the Chicago and North Western Transportation Company (CNW). Petitioner Patrick W. Simmons, the Illinois Legislative Director for the United Transportation Union (UTU), filed objections to the acquisition with the ICC, seeking a stay of the acquisition's consummation, and, later, a revocation of the use of the class exemption procedure. Pet. App. 4a-5a.

Simmons alleged that the CCRC operation would not be viable or efficient; that off-line shippers would be adversely affected; that CCRC's affiliation with the main shipper on the line, Seegers Grain Inc., would produce an undue concentration of market power that would adversely affect rival grain shippers and would violate 49 U.S.C. 10746 (the "commodities clause"); and that rail employees would lose jobs with CNW without being accorded labor protection. Pet. App. 36a, 45a-46a. After analyzing each of Simmons' contentions, the ICC denied the petitions for a stay and to revoke the exemption for the acquisition of the rail line at issue, *id.* at 29a-34a, 35a-47a, and rejected Simmons' petition for reconsideration. *Id.* at 48a-55a.

b. Subsequently, CNW invoked the *Abandonment Exemption* in order to abandon an adjacent 6.5 miles of track between Chemung and Poplar Grove, Illinois (immediately west of the segment acquired by CCRC). There were no shippers on that line segment, and overhead traffic had been rerouted because of a derailment that had severely damaged the segment. Pet. App. 19a-20a.

Simmons and two off-line shippers—petitioners McLay Grain Company and Edenfruit Products Company (both located west of this line segment and neither an active rail user)—objected to the abandon-

ment in petitions filed with the ICC for a stay and for a revocation of the exemption. They claimed that the abandonment of the segment (with the sale of adjacent track to CCRC) was part of a larger design by CNW that would lead to abandonment of an additional 13.4 miles of track from Poplar Grove to South Beloit, Illinois, and that it was an abuse of the class exemption for CNW to use it in conjunction with its other efforts to dispose of adjacent portions of track. They also argued that the ICC's environmental analysis was inadequate, because it did not include the effects of abandoning the remaining portion of the line to South Beloit. The ICC rejected the petitions for a stay and to revoke the exemption for the abandonment of this line. Pet. App. 56a-62a, 63a-73a.

3. a. Simmons then filed a petition for judicial review of the ICC's decision in the acquisition case. Although observing that substantial record evidence appeared to support the ICC's decision, Pet. App. 7a, the court of appeals did not reach the merits because it dismissed Simmons' petition for lack of standing. The court concluded that although Simmons satisfied Article III requirements for standing, he failed to satisfy prudential limits on standing because the injury he alleged does not fall within the zone of interests protected by the pertinent provisions of the Interstate Commerce Act. Pet. App. 8a-11a.

The court treated Simmons as petitioning on behalf of the UTU and its members, and, therefore, as representing the interests of rail labor. Pet. App. 3a-4a, 7a-8a. But, the court explained, the only injury alleged on behalf of rail labor was that "members of the UTU will lose their jobs due to the sale of the line." *Id.* at 8a. That injury, the court found, did not satisfy the zone of interest test as explicated

in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987). Pet. App. 8a-10a.

To determine the zone of interests protected by the Act, the court looked to the rail transportation policy expressed in 49 U.S.C. 10101a. It observed that the only provision applicable to rail employees, Section 10101a(12), encourages "fair wages and safe and suitable working conditions in the railroad industry." Examining that provision, the court concluded that the Act is not intended "to protect a rail employee's interest in retaining his job." Pet. App. 10a. Accordingly, "the Act's zone of interests does not encompass the only [labor] interest which Simmons alleges the ICC's action threatens." *Ibid.* The court also found that, because Simmons lacked standing in his own right, he did not have standing to represent the public interest. *Id.* at 10a-11a, citing *Sierra Club* v. *Morton*, 405 U.S. 727, 737 (1972).[1]

b. Both Simmons and the two off-line shippers sought judicial review of the ICC's decisions in the abandonment case. Simmons again alleged that rail employees would lose jobs due to the abandonment. The two shippers alleged that they would be competitively injured vis-a-vis competing shippers on the line segment sold to CCRC, and they challenged the adequacy of the ICC's environmental analysis. Although noting that substantial evidence appeared to support the ICC on the merits, Pet. App. 23a, the court of appeals dismissed the petitions for review on standing grounds. *Id.* at 18a-26a.

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[1] Two judges dissented from the denial of rehearing en banc, arguing that rehearing was warranted to examine whether the panel had read the zone of interests test too narrowly. Pet. App. 13a-17a. Those judges believed that it was possible that the panel had "undermine[ed] Congress's intention that the voice of labor be heard." *Id.* at 16a.

The court first held that the shipper petitioners lacked Article III standing to bring their competitive-injury claims. Applying the analysis set forth in *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), the court found that the shippers met the requirement of injury-in-fact, but not the requirement that the injury be fairly traceable to the ICC's decision allowing the abandonment. Pet. App. 23a. The court explained that the shippers' alleged injuries would be redressed only by repair of the damaged track, but the ICC's challenged action pertained only to whether the line may be abandoned, not whether it must be repaired. It noted that there was no evidence that CNW "would likely repair the derailment if the request to abandon were denied" and any expectation to the contrary was "unadorned speculation." *Id.* at 24a.

Next, the court dismissed the shippers' procedural challenge to the ICC's environmental analysis on grounds that it failed the injury-in-fact test. Pet. App. 25a. Finally, the court dismissed Simmons' petition by reiterating its conclusion in the acquisition case that "rail employees' interests in retaining their jobs are not within the zone of interests protected by the Interstate Commerce Act." *Id.* at 26a.

ARGUMENT

1. Petitioner Simmons contends (Pet. 14-19) that the court of appeals erred in holding that the interest of rail employees in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act. The court's holding, however, properly applies this Court's zone of interest jurisprudence and does not warrant further review.

a. The Administrative Orders Review Act, commonly known as the Hobbs Act, 28 U.S.C. 2341 *et seq.*, authorizes judicial review in the court of appeals at the behest of a "party aggrieved" by a final ICC order. 28 U.S.C. 2321, 2342(5), 2344. The Hobbs Act, however, does not authorize judicial review at the behest of any participant in an administrative proceeding, or even one who may be adversely affected by the agency's action; rather, a party must establish that the injury he alleges is within the zone of interests protected by the statute at issue.[2]

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[2] *Kansas City S. Indus., Inc.* v. *ICC*, 902 F.2d 423, 429-430 & n.3 (5th Cir. 1990) ("To determine whether a petitioner is aggrieved under section 2344, we generally incorporate traditional article III and prudential standing analysis"; finding zone of interests test satisfied on the particular facts); *National Treasury Employees Union* v. *United States MSPB*, 743 F.2d 895, 910 (D.C. Cir. 1984) ("The courts that have considered the scope of § 2344's 'aggrieved party' language have engaged in traditional standing doctrine analysis," including the zone of interests inquiry). Courts have also applied the zone of interests test, which "is most usefully understood as a gloss on the meaning" of 5 U.S.C. 702, *Clarke*, 479 U.S. at 400 n.16, under other statutes that permit review to "aggrieved" parties or persons. See, *e.g.*, *Chicago Mercantile Exch.* v. *SEC*, 883 F.2d 537, 541 (7th Cir. 1989) ("person aggrieved" language in 15 U.S.C. 78y(a) of the Securities Exchange Act of 1934), cert. denied, 110 S. Ct. 3214 (1990); *Panhandle Producers & Royalty Owners Ass'n* v. *Economic*

"In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are * * * marginally related to or inconsistent with the purposes implicit in the statute." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Applying that test, the court of appeals correctly concluded that petitioner's allegations of injury do not fall within the zone of interests protected by the Interstate Commerce Act.

The Interstate Commerce Act recognizes that rail labor has a significant interest in transactions involving carriers, but it accommodates that interest in particular ways. The Act does not guarantee that rail employees will not lose their jobs as a result of an ICC-authorized rail acquisition or abandonment. Rather, it authorizes the ICC to impose compensatory labor protective provisions in connection with

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Regulatory Admin., 822 F.2d 1105, 1108-1109 (D.C. Cir. 1987) ("party * * * aggrieved" language in 15 U.S.C. 717r(b) of the Natural Gas Act); *Orange Park Florida T.V., Inc.* v. *FCC*, 811 F.2d 664, 673 (D.C. Cir. 1987) ("person * * * aggrieved" language in 47 U.S.C. 402(b)(6) of the Federal Communications Act). In *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 476-477 (1940), this Court held that a competitor to an FCC licensee was "aggrieved" or otherwise "adversely affected" by the FCC's grant of a license to a competitor, even though the relevant statute did not protect against economic injury to competitors. *Sanders* remains good law on its facts, but the opinion predates this Court's elaboration of the zone of interests test and does not reflect contemporary developments in standing doctrine. In any event, because the statutory language examined in *Sanders* is broader than that of the Hobbs Act, *Sanders* does not suggest that a "zone" inquiry is unnecessary here, and petitioner does not so contend.

those transactions. 49 U.S.C. 10901(e) (new operations), 10903(b)(2) (abandonments), 11347 (general labor protection provision). Protective provisions serve to cushion a transaction's consequences to rail labor while allowing the transaction to go forward, thereby promoting the congressional policy to obtain the benefits of efficiency producing transactions. Cf. *United States* v. *Lowden*, 308 U.S. 225 (1939).

If petitioner had sought judicial review of the ICC's denial of compensatory labor protections in the acquisition case, see Pet. App. 46a, he would have had standing to raise that claim. But petitioner did not do so. Nor did petitioner contest the adequacy of the ICC's customary labor protections for abandonment transactions, which the ICC imposed on CNW here.[3] See *Chicago & N.W. Transp. Co.—Abandonment Exemption*, 53 Fed. Reg. 40,281 (Oct. 14, 1988). Finally, petitioner did not seek review on the basis of an injury to wage levels or working conditions, which might have fallen within the scope of the Act's general rail transportation policy, one component of which is "to encourage fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12). Rather, petitioner's alleged injury arises solely from the possibility that certain rail employees might suffer unemployment as a result of the transactions authorized by the ICC, and he seeks to use that injury as a springboard for challenging the transactions themselves. Pet. App. 8a, 26a.

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[3] The Commission's decision in *Oregon Short Line R.R.-Abandonment-Goshen*, 360 I.C.C. 91 (1979), sets forth the standard labor conditions attached to ICC abandonment authorizations.

Unemployment injury, however, is not a basis for seeking review of alleged violations that have nothing to do with the labor provisions of the Act. Not only does the Act "not explicitly provide for the preservation of jobs as a goal in and of itself," [4] it would be contrary to the Act's policy to disallow rail transactions solely in order to avoid potential unemployment on the part of rail employees. Indeed, at the time Congress added the labor protection provisions in the Transportation Act of 1940, ch. 722 § 7, 54 Stat. 906-907—the predecessor to 49 U.S.C. 11347—it specifically rejected a proposal, known as the Harrington Amendment, that would have accomplished that objective.

The Harrington Amendment provided that no transaction would receive ICC approval if it would result in the "unemployment or displacement of employees of the carrier[s]." 84 Cong. Rec. 9882 (1939). The Amendment was defeated after the ICC warned that it would impede transactions necessary to secure the health of the railroad industry, and that, if such transactions were blocked, in the long run more rail jobs would be lost.[5] In *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961), this Court reviewed the debate surrounding the defeated Harrington Amendment and concluded that authoritative explanations

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[4] Pet. App. 17a (Cudahy, J., dissenting from the denial of rehearing en banc).

[5] See Staff of House Legislative Comm. on Intersate Commerce Comm'n, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* 67 (Comm. Print 1940); cf. *Railway Labor Ass'n* v. *United States*, 339 U.S. 142, 151 (1950) (noting that the Harrington Amendment "threatened to prevent all consolidations to which it related").

of the "final version [of the labor protective provision] clearly reveal an understanding that compensation, not 'job freeze,' was contemplated" by the Act. *Id.* at 176; see also *id.* at 172-179 (holding that the Act does not require that employees be retained on the payroll of the surviving carrier in a regulated transaction; compensatory arrangements are sufficient).

Against that background, the unemployment injury alleged by petitioner is not within the zone of interests protected by the Act. Although the zone of interests test may not be "especially demanding," and does not require a "congressional purpose to benefit the would-be plaintiff," it does exclude "plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12, 399-400. That is exactly the case here. Far from being within the zone of interests protected by the Act, it is inconsistent with the Act's policy to permit rail labor to challenge ICC orders with the goal of seeking perpetual employment for represented employees.[6]

Petitioner gains no support (Pet. 17-18) from *United States* v. *Lowden*, *supra*. In that case, which antedated the ICC's specific statutory authority to impose labor protective provisions, the Court held that the ICC could impose such compensatory arrangements (like those now authorized by 49 U.S.C.

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[6] Cf. *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d 1038, 1044-1447 (D.C. Cir. 1989) (federal employees and labor unions cannot challenge decision to contract-out certain services; because the relevant statute contemplates that some employees would be terminated under the budgeting process, the statute is "fundamentally inconsistent with the interests asserted by" the plaintiffs), cert. denied, 110 S. Ct. 3214 (1990).

11347) in order to further the general policy of the Act to facilitate railroad consolidations. 308 U.S. at 229, 238. *Lowden* does not support petitioner's more radical thesis that it is within the Act's zone of interests to prevent such transactions altogether to forestall rail labor unemployment.

Petitioner's claim to standing fails for an additional reason: the particular issues on which he sought judicial review are not based on rail labor concerns at all, but are based on alleged violations of provisions designed to protect shippers and competitors. Violations of those provisions are entirely unrelated to the injury alleged by petitioner; accordingly, he cannot establish standing to assert them. Cf. *Water Transport Ass'n* v. *ICC*, 819 F.2d 1189, 1193-1194 & n.33 (D.C. Cir. 1987) (water carriers were not within the zone of interests protected by a requirement for public dissemination of the terms of ICC-filed rail contracts); *Aluminum Co.* v. *United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (rail shipper was not within the zone of interests protected by a provision allowing ICC review of state decisions at the behest of rail carriers).[7] If there were violations of the provisions on which petitioner relies, they could have been challenged by a party with an injury within the zone of interests of the relevant provisions.[8]

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[7] See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990) (a plaintiff under the Administrative Procedure Act, 5 U.S.C. 702, "must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

[8] Although one of the issues presented in *Air Courier Conference* v. *American Postal Workers Union*, No. 89-1416 (ar-

Finally, the court of appeals properly rejected petitioner's contention (Pet. 18) that he had standing as a representative of the public. Standing must flow from the particular injury asserted by the petitioning party before public interest arguments may be advanced. *Sierra Club* v. *Morton*, 405 U.S. 727, 737 (1972).

b. Relying on 49 U.S.C. 10328(a), petitioner contends (Pet. 14) that rail labor enjoys "an absolute right to be heard in any proceeding under the Interstate Commerce Act that affects the employees." Section 10328(a) states: "Designated representatives of employees of a carrier may *intervene* and be heard in a proceeding arising under this subtitle that affects those employees" (emphasis added). Rather than authorizing rail employees to initiate judicial review—as petitioner did here—that provision is narrowly tailored to permit intervention in cases that are already pending.

Petitioner errs in arguing (Pet. 14) that Congress must have intended to authorize judicial review at the behest of rail labor in any case in which it par-

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gued Nov. 28, 1990), bears some resemblance to the issue presented here, we do not believe that the Court need hold the instant petition for the decision in that case. In *Air Courier Conference*, we have argued that the union's alleged injury (reduction of employment opportunities) does not come within the zone of interests protected by the postal statutes whose violation the union alleged in its complaint under the APA. We have also argued that the APA does not apply at all in that case. If the Court accepts either argument, its holding would be consistent with (and perhaps supportive of) the court of appeals' decision here. But even if the Court decides otherwise in *Air Courier Conference*, this case is distinguishable because of the particular scheme of regulation under the Interstate Commerce Act, and the conflict between petitioner's claim of injury and the policy of the Act.

ticipates administratively. Participation in agency proceedings does not, in and of itself, confer judicial standing. *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249, 255 (1930); *Competitive Enter. Inst.* v. *United States Dep't of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988). And it is perfectly logical for Congress to encourage intervention by rail labor in pending proceedings under a fairly lenient standard, while requiring a party who wishes to initiate a new judicial proceeding to establish that it satisfies the usual prudential requirements for invoking the court's jurisdiction.

For the same reasons, petitioner's reliance (Pet. 14-15) on *Railroad Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 529 (1947), and *American Trucking Ass'ns* v. *United States*, 355 U.S. 141, 144 (1957), is misplaced. Those cases construed the predecessor to Section 10328(a) to authorize rail labor to *intervene* in a pending suit to enforce an ICC order; the Court had no occasion to consider whether that provision authorizes the institution of new proceedings for review of an agency order under the Hobbs Act.[9]

c. At bottom, petitioner's standing arguments rest on the mistaken premise that "[t]his is the first known instance * * * where standing has been denied to railroad labor in proceedings in which job elimination is a consideration." Pet. 13. Despite the impressive breadth of this claim, petitioner fails to sup-

[9] Although the opinion in *American Trucking Ass'ns* uses the phrase "standing to sue," the Court relied on the provision authorizing intervention, 355 U.S. at 144, and the status of the labor representative as an "intervening plaintiff" is made clear by the identification of counsel in the district court opinion, *American Trucking Ass'ns* v. *United States*, 144 F. Supp. 365, 366 (D.D.C. 1956).

port it with citations to decisions from any other court of appeals.[10] Nor are we aware of any decision involving zone of interests analysis that creates an intercircuit conflict on the standing of rail labor.[11] Representatives of rail labor have often raised claims based on violations of provisions of the Act that are specifically intended to protect labor interests,[12] and have participated in proceedings in which other parties litigated more general transportation issues.[13] But no court of appeals appears to have found the zone of interests test to be satisfied by rail labor in a case like this one.

2. The off-line shippers contend (Pet. 19-20) that the court of appeals erred in finding that they failed to satisfy Article III standing requirements in the abandonment case. Those petitioners do not rely on a claim of environmental standing in this Court, but

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[10] That petitioner may have been permitted to raise similar claims in the Seventh Circuit prior to the decision in this case, see Pet. App. 13a n.1, creates no conflict warranting this Court's attention.

[11] In *Brotherhood of Ry. Carmen* v. *ICC*, 917 F.2d 1136 (8th Cir. 1990), the court did reject the ICC's argument that rail labor's alleged injuries were too speculative to show Article III standing, but, after stating that the standing issue "merge[d]" with one of the arguments on the merits, the court went on to reject rail labor's general challenges to the ICC's orders. *Id.* at 1137. Because the brief opinion in *Carmen* did not discuss the zone of interests issue, that decision, ultimately adverse to rail labor, does not suggest that the Eighth Circuit would accept petitioner's standing in a case like this one.

[12] See, *e.g.*, *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994 (2d Cir. 1986); *Railway Labor Executives' Ass'n* v. *United States*, 819 F.2d 1172 (D.C. Cir. 1987).

[13] See, *e.g.*, *Illinois Commerce Comm'n* v. *ICC*, *supra*.

they do assert Article III standing in their capacity as shippers who might suffer competitive injury as a result of the abandonment of the track. The court of appeals correctly concluded that reversal of the ICC's decision would not remedy that alleged injury, and the court's fact-bound ruling does not merit this Court's review.

The court of appeals based its decision on the finding that the competitive harm asserted by the off-line shippers is not traceable to the ICC's abandonment decision and would not be redressed by overturning it. The abandoned track is already out of service; petitioners would not benefit from reversal of the ICC's decision unless CNW on its own decided to restore the damaged track and once again route traffic over it.[14] But there is nothing in the record that suggests that CNW would do so if the ICC's authorization of the abandonment were reversed. Pet. App. 24a. Short of speculation, petitioners do not claim otherwise. Accordingly, the court correctly concluded that any injury petitioners alleged would not be redressed by a ruling in their favor.

Petitioners err in contending (Pet. 18-19) that the court of appeals' decision conflicts with *Chicago &*

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[14] Routing selections are within the carrier's management discretion, because it is assumed that a carrier will maintain the most efficient routes and aggregate traffic in order to minimize costs. *Illinois Commerce Comm'n* v. *ICC*, 848 F.2d at 1250. See *Illinois* v. *ICC*, 698 F.2d 868, 873 (7th Cir. 1983) (acknowledging well-established principle that the routing of overhead traffic and the selection of alternate routes is a matter of managerial discretion); cf. *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 377 (7th Cir. 1983) (shipper is usually indifferent whether his shipment travels on direct or circuitous route provided there is no price difference).

N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). That case, which reversed a state court judgment in favor of a shipper, holds only that when the ICC has approved a carrier's decision to abandon a line, the Act preempts a shipper's suit claiming that the carrier has violated state-law duties in refusing to provide service on the abandoned track. The case does not address Article III's standing requirements, in reversing a judgment that had been entered against the petitioner railroad. Cf. *Asarco Inc.* v. *Kadish*, 109 S. Ct. 2037, 2045-2046 (1989). No question of redressability of the plaintiff's alleged injury was involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and CHICAGO-CHEMUNG RAILROAD CORPORATION

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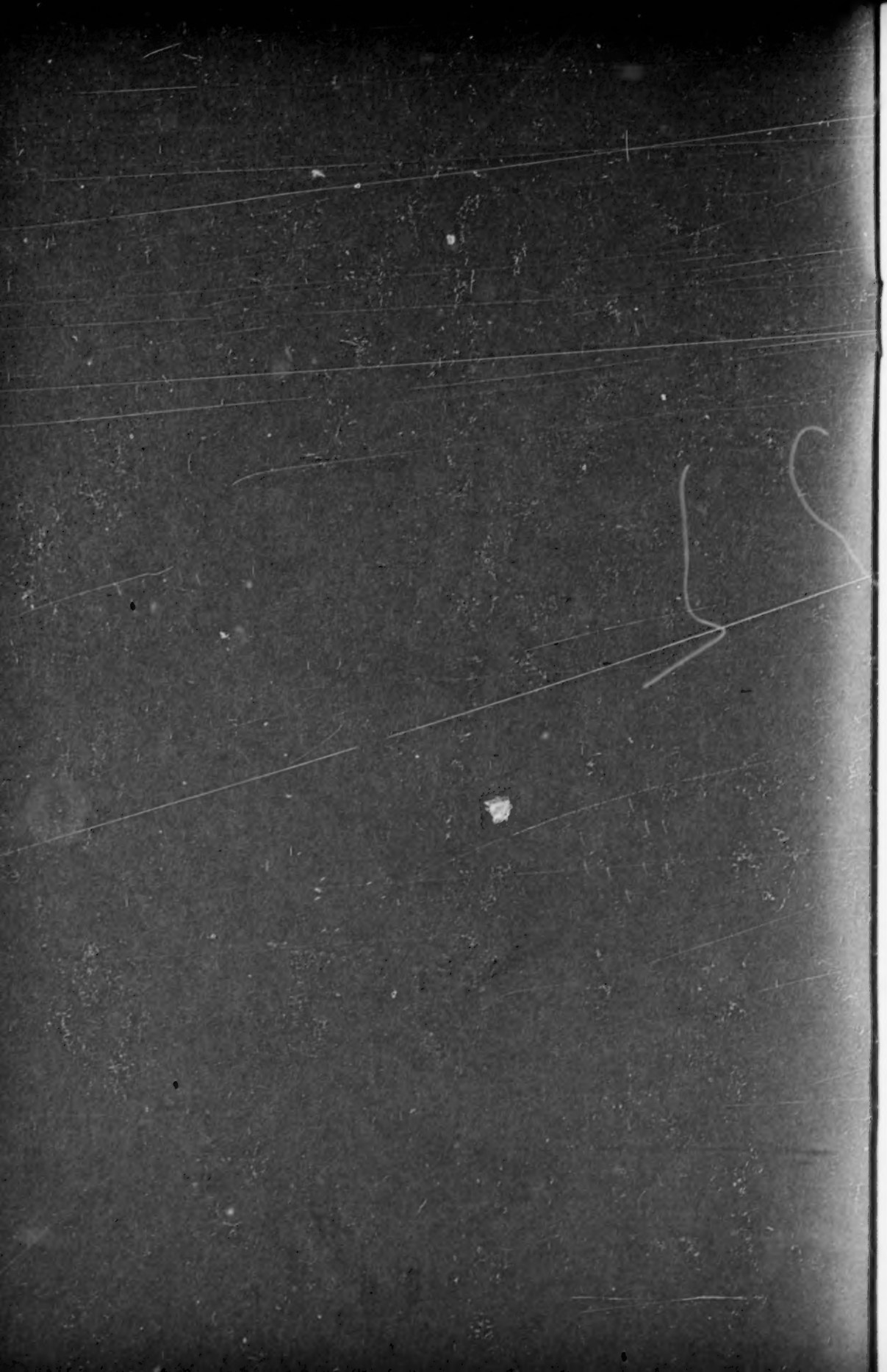

QUESTIONS PRESENTED

1. Whether a representative of rail carrier employees has standing to petition for review of Interstate Commerce Commission orders upholding the validity of a rail line acquisition and a rail line abandonment solely on the basis of the employees' interest in job retention.

2. Whether industries which are not served by a rail line proposed for abandonment have standing to seek judicial review of an Interstate Commerce Commission order upholding the validity of a rail line abandonment where overturning the ICC order will not in itself restore train service over the line and the abandonment will not result in the loss of rail service to those industries.

RULE 29.1 STATEMENT

Respondent Chicago & North Western Transportation Company is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation. Union Pacific Corporation holds 100% of the non-voting preferred stock of Chicago & North Western Holdings Corporation. Respondent Chicago & North Western Transportation Company has the following subsidiaries apart from wholly-owned subsidiaries within the meaning of Rule 29.1 of this Court: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation & Railroad Assurance Company, Ltd., Transportation Quality Systems, Inc. and C&NW Realco, Inc.

Respondent Chicago-Chemung Railroad Corporation is not owned by a parent corporation and does not have any subsidiaries.

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No. 90-959

IN THE

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OCTOBER TERM, 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY,

Petitioners,

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INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and CHICAGO-CHEMUNG RAILROAD CORPORATION

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from two decisions of the Court of Appeals for the Seventh Circuit in which the court dismissed petitions for review of Interstate Commerce Commission orders. In Docket No. 88-3207, Patrick W. Simmons sought review of Interstate Commerce Commission orders approving a rail line sale involving respondents Chicago & North Western Transportation Company ("C&NW") and Chicago-Chemung Railroad Corporation ("CCRC"). (The "Acquisition Case") In Docket Nos. 88-3211 and 89-1961, Patrick W. Simmons, McLay Grain Company, and Edenfruit Products Company sought review of Interstate Commerce Commission orders refusing to revoke C&NW's Abandonment Exemption for an "out-of-service" rail line. (The "Abandonment Case") Both petitions were dismissed by the Seventh Circuit for lack of standing on the part of the petitioners. As will be discussed below, the Seventh Circuit decisions are thoroughly consistent with the precedents set forth by the United States Supreme Court and the Circuit Courts of Appeal. Accordingly, respondents C&NW and CCRC respectfully request that the Petition for a Writ of Certiorari be denied.

1. The Acquisition Case

This case involved acquisition of a 3.5 mile rail line (including incidental trackage rights) from the C&NW, for operation by a new carrier, the CCRC. The line extends from Harvard to Chemung and is located in the State of Illinois. The acquisition was consummated pursuant to the Class Exemption adopted by the Interstate Commerce

Commission ("Commission") in connection with sales of a rail line for operation by a new carrier. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom., Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987) ("Class Exemption") Patrick W. Simmons challenged this exemption, first with a petition for stay, then with a petition for revocation, and, finally, with a petition to reopen. The Commission reviewed each and every one of Simmons' arguments, found them to be thoroughly meritless, and refused to stay or revoke the exemption. Thereafter, Simmons sought review of these orders in the U.S. Court of Appeals for the Seventh Circuit.

Much of Simmons' argument before the Commission and the Seventh Circuit attempted to cast this proceeding in the context of an abandonment proceeding. This did not accurately portray the transaction. This case involved an acquisition from C&NW of a short line and the creation of a new short line rail carrier. The acquisition has resulted in the continuation and preservation of rail service to any and all shippers located on the line which was acquired. *No* shippers, either on this rail line or any adjacent rail line, have lost rail service in consequence of this acquisition. Indeed, no shippers on the line joined with Simmons in the petition for review.

In enacting the Class Exemption for rail line sales where a new carrier is involved, the Commission concluded that the exemption of these transactions from regulation would foster the National Rail Transportation Policy, "by minimizing the need for federal regulatory control over the rail transportation system, ensuring the development and continuation of a sound rail transportation system, fostering sound economic conditions in transportation, reducing regulatory barriers to entry, and encouraging efficient rail

management." 1 I.C.C. 2d at 817. This Class Exemption is intended to serve both shipper and community interests by facilitating continued rail service on lines that the selling carrier can no longer operate economically, by new, smaller carriers which can provide the service more efficiently. 1 I.C.C. 2d at 817.[1]

The acquisition of this 3.5 mile Harvard-Chemung line by CCRC fell squarely within the purposes enunciated by the Commission when it adopted this Class Exemption. Instead of pursuing a possible abandonment of the Harvard-Chemung line, with resultant loss of rail service to shippers, C&NW entered into a sale of the rail line for operation by a new local carrier in order to preserve con-

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[1] For many years, both entry into and exit from the railroad industry have required prior extensive regulatory review and approval by the Commission. For example, under 49 U.S.C. §10901, the Commission must evaluate whether the present or future public convenience and necessity require or permit the acquisition or operation of a rail line by the carrier involved. Similarly, under 49 U.S.C. §10903, the Commission must determine whether the public convenience and necessity permit the abandonment of rail operations over a line. However, in 1980, in response to the serious financial conditions in the railroad industry (which included a series of major bankruptcies in connection with large railroad carriers), and increased competition with motor carriers, barges and airlines, Congress limited the extent of the Commission's rail regulation. As is pertinent here, Congress expanded the Commission's power under 49 U.S.C. §10505 to exempt rail transactions and services from regulatory requirements. The Commission is now directed to exempt transactions or services from its regulation whenever it finds that (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101a, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not needed to protect shippers from abuse of market power. 49 U.S.C. §10505(a). The Class Exemption discussed herein with respect to acquisition by new carriers and the "Notice of Exemption" which will be discussed *infra* in connection with abandonment of "Out-of-Service" rail lines are among the exemptions promulgated by the Commission in response to this Congressional direction.

tinued service to shippers on the line. Thus, as the Commission concluded when it enacted the Class Exemption:

> "The vital interests of shippers, communities and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost." 1 I.C.C. 2d at 817.

Simmons claimed that the Commission should be required to make statutory "public convenience and necessity" findings with respect to this transaction under 49 U.S.C. §10901. However, Simmons' claims were nothing more than an impermissible collateral attack on the foundations of the Class Exemption itself. The Commission has exempted these types of line sales from regulation under 49 U.S.C. §10901, and that decision has been affirmed on review. *Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir., 1987). The Commission was not and is not required to re-examine the underpinnings of the Class Exemption each time a new line sale occurs. Here, the evidence established that this sale would preserve viable line service to shippers on the Harvard-Chemung line, and Simmons presented no evidence to the contrary. As the Commission stated in this proceeding:

> "Here Simmons has not provided specific evidence to support his challenge to CCRC's viability and there is no evidence before us suggesting that CCRC will not be viable, financially or otherwise.* * *
>
> Simmons' generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line. Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line's shippers." (Pet. at 40a, 41a)

Simmons also claimed, without any evidentiary basis whatsoever, that the transaction would result in C&NW personnel losing employment. Simmons' claim in that regard was the unremarkable proposition that C&NW employees who formerly worked on the Harvard-Chemung line could not continue to do so. He did not provide any evidence whatsoever that any C&NW employees would actually lose their jobs.

Significantly, Simmons did not even *attempt* to make the requisite showing necessary for the imposition of labor protective conditions. As will be discussed in greater detail below, these Commission imposed conditions provide a compensatory remedy for employees affected by a Commission authorized transaction. Simmons did *not* allege, or even suggest, "exceptional circumstances" purporting to justify the imposition of labor protective conditions on this transaction. Absent such "exceptional circumstances," labor protective conditions will not be imposed. *Class Exemption*, 1 I.C.C. 2d at 815; see also, Pet. at 46a, 47a.

On Petition for Review before the U.S. Court of Appeals for the Seventh Circuit, Simmons did not claim that the Commission erred in failing to impose labor protective conditions, nor did he suggest to the court the existence of any exceptional circumstances warranting imposition of said conditions. Rather, Simmons opposed the acquisition generally in reiterating his claims that CCRC's operations would not be viable and industries not located on the line would allegedly be adversely affected. Indeed, Simmons' only assertion on appeal with respect to C&NW employees came in his reply brief in which he suggested that C&NW employees would no longer be able to work on the Harvard-Chemung line due to the sale to CCRC.

The Seventh Circuit Court of Appeals concluded that substantial evidence in the record supported the Commission on the merits. However, the Court did not rule on the merits of Simmons' arguments, because it found that Simmons lacked standing to present them to the Court. The Court noted that the only alleged injury to rail labor interests is possible loss of jobs. *Simmons v. I.C.C.*, 909 F.2d 186, 189 (7th Cir. 1990). The Court found this sufficient to meet the Article III standing requirements, but not the "zone of interest" requirement (prudential limitation) as set forth in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), as clarified in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987). 909 F.2d at 189-190. The Court concluded that the Act is not intended "to protect a rail employee's interest in retaining his job," and that "the Act's zone of interests does not encompass the only (labor) interest which Simmons alleges the ICC's action threatens." *Id.* at 190.

Finally, the Court held that, absent standing in his own right, Simmons lacks standing as a representative of the public interest, citing *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). *Id.* at 190. Simmons' petition for rehearing and suggestion for rehearing en banc was denied.

2. The Abandonment Case

This case involved the abandonment of a 6.5 mile no-business rail line by the C&NW. The line extended from Milepost 67.5 west of Chemung to Milepost 74.0 east of Poplar Grove, and was located in the State of Illinois ("Chemung-Poplar Grove line"). The abandonment was consummated pursuant to the Notice of Exemption procedures adopted by the Commission in connection with

the abandonment of out-of-service rail lines. See *Exemption of Out-of-Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C. 2d 55 (1984), *remanded, Illinois Commerce Commission v. I.C.C.*, 787 F.2d 616 (D.C. Cir. 1986), *aff'd, Illinois Commerce Commission and Patrick Simmons v. I.C.C.*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783.

The Chemung-Poplar Grove line served no one. No rail traffic originated or terminated on the line in the two years preceding C&NW's filing of the Notice of Exemption. Indeed, as petitioners candidly admitted before the Commission and the Seventh Circuit, no shippers or receivers were located on the line. In fact, there was no evidence that anyone at any time ever originated or terminated traffic on this line.

Further, no off-line overhead traffic had moved over this rail line in over one and one-half years prior to the filing of the Notice of Exemption. Any such overhead traffic had long since been rerouted onto a duplicate parallel C&NW main line.

The eastern end of this rail line adjoined a 3.5 mile line segment extending from Harvard to Chemung, which was the subject of the Acquisition Case. The western end of the Chemung-Poplar Grove line was located adjacent to a 13.4 mile line segment extending from Poplar Grove to South Beloit. The two line segments were severed by a 624 foot derailment. Since approximately November of 1986, any Poplar Grove traffic had been routed via C&NW's duplicate parallel line extending between South Beloit and Harvard.

The petitioners in this case shared a common thread, to wit, none of them were adversely affected by this abandonment. Patrick W. Simmons purported to represent a

segment of C&NW's transportation employees. In view of the fact that no transportation service was provided on the subject line, and no shippers were losing service as a result of this abandonment, no transportation employees were adversely affected.

McLay Grain Company ("McLay") is an industry located at Poplar Grove. McLay had not shipped by rail since the 1970's, and had shipped exclusively via trucks since that time (Pet. at 42a). In any event, this abandonment did not eliminate service to any Poplar Grove industries, or any industries at all for that matter.

Petitioner Edenfruit Products Company ("Edenfruit") is also an industry located at Poplar Grove. Edenfruit shipped no cars in 1985, one car in 1986 and none since that time. (Pet. at 42a). And, once again, Edenfruit was *not* located on the subject line segment, it was *not* served by the subject line and it has *not* lost service as a result of the abandonment of this line.

No actual rail shippers on C&NW's rail system opposed this abandonment before the Commission or participated in post-Commission review proceedings. No communities near the line exhibited any opposition to this abandonment. Indeed, petitioners attempted to include the Village of Poplar Grove in their opposition pleadings before the Commission, and Poplar Grove specifically required petitioners to withdraw its name from the opposition.

The Commission confirmed this Notice of Exemption by a decision dated October 14, 1988.[2] In addition to con-

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[2] Petitioners did not attach a copy of the Notice of Exemption to their petition. As such, respondents have attached a copy of the Notice of Exemption hereto, as Appendix A.

firming the Abandonment Exemption, the decision imposed standard labor protective conditions for any employees affected by the abandonment, pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

Petitioners challenged the Notice of Exemption, first with a petition for stay, then with a petition to revoke the exemption. They claimed that C&NW was improperly abusing market power by segmenting three line segments, to wit, Harvard to Chemung (The Acquisition Case), Chemung to Poplar Grove (The Abandonment Case), and the third segment from Poplar Grove to South Beloit, which was not the subject of any pending proceeding, and which served all shippers at Poplar Grove.

There was no allegation of any adverse impact on employees. Nor did petitioners claim that the labor protective conditions imposed by the Commission were insufficient. Further, petitioners did not assert that any shippers would lose direct service in consequence of this abandonment. Rather they claimed, in effect, that shippers at Poplar Grove would only have access from one rail line route instead of two, and the available route is allegedly more circuitous (32 miles as opposed to 10 miles).

The Commission rejected petitioners arguments. It noted that there were not two rail line routes available to Poplar Grove shippers in view of the sale of the Harvard-Chemung line in the Acquisition Case and the derailment east of Poplar Grove. The Commission stated that "Petitioners ignore the fact that the C&NW no longer has a line between Harvard and Chemung since its sale to CCRC. It is difficult to see how C&NW can abuse a market on a line which it no longer owns or operates." (Pet. at 67a)

As to the derailment, the Commission noted that "even if the C&NW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the money-losing Chemung-Poplar Grove operation." (Pet. at 66a, n. 5) Further, the Commission stated that "repairing the derailment and re-instituting the money-losing Chemung-Poplar Grove operation would seem to be neither an efficient use of carrier resources nor good management; nor it is necessary to foster sound transportation or sound economic conditions in transportation." (Pet. at 69a)

Finally, the Commission refused to accept petitioners suggestion that C&NW could not abandon the Chemung-Poplar Grove rail line until it filed for an abandonment of the adjacent Poplar Grove-South Beloit line. As discussed above, it is this latter rail line which is being used by Poplar Grove shippers. The Commission stated:

> "Nor will we consider the potential abandonment of the Poplar Grove-South Beloit line before an application (or exemption request) has been filed. In the November 10 stay denial, we rejected petitioners' argument that C&NW is abusing the class exemption because it was part of its broader strategy to abandon the entire Chemung-South Beloit line. We noted that it is fully consistent with the RTP to permit a carrier to segment its lines and first move forward with the abandonment of those that are the least profitable, slip op. at 2. Petitioners' position would require a carrier to continue operating a clearly unprofitable and, as here, unused and unneeded portion of a line while it decided if, and when, it will seek to abandon the remaining line segment. Such a requirement would foster a wasteful use of carrier resources, which clearly is contrary to the RTP." (Pet. at 68a)

On petition for review before the U.S. Court of Appeals for the Seventh Circuit, petitioners argued that the abandonment should be denied because McLay and Edenfruit would be injured by virtue of losing access to the rail line, the Commission's finding as to the derailment repair was arbitrary and capricious, and that the Commission failed to properly consider potential environmental concerns on the adjacent Poplar Grove-South Beloit segment when it allowed the abandonment of the subject line.

Petitioners did not challenge the Commission's decision imposing labor protective conditions, nor did they suggest that additional protective conditions were necessary. Indeed, no labor issue was raised whatsoever on appeal until oral argument when Simmons suggested that the abandonment might somehow result in the loss of jobs, even though it was undisputed that no service had been provided over the abandoned line for several years.

The Seventh Circuit again concluded that substantial evidence in the record supported the Commission on the merits. However, the Court did not rule on the merits of petitioners' arguments, because it found that the petitioners lacked standing to bring them to the Court. With respect to Patrick Simmons, the Court found, as it had in the Acquisition Case, that Simmons' only alleged injury to rail labor is a possible loss of jobs. Once again, the Court concluded that rail employees' interest in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act, citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). *Simmons et al. v. I.C.C.*, 900 F.2d 1023, 1027 (7th Cir. 1990).

As to petitioners Edenfruit and McLay, the Court held that those petitioners failed to satisfy the third prong of the Article III standing requirements, to wit, that the

injury must be one that is likely to be redressed through a favorable decision, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) and *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). The Court concluded that the most that it could do in response to petitioners' request is to stop C&NW's abandonment of the line. Since the Court could not force C&NW to repair the damaged line, and only repair of the line would sufficiently redress the injuries alleged by petitioners, the petitioners failed to meet the third prong of the standing test outlined in the aforementioned citations. *Id.* at 1026.

The Court also noted that petitioners had alleged that the Commission did not use proper procedure in making its environmental impact findings. However, the Court pointed out that there was no allegation, either before the Commission or on appeal, that petitioners would be adversely affected by any environmental damage alleged to be caused by the abandonment. Indeed, petitioners did not even allege any specific environmental damage. The Court concluded that, in order to seek redress on this basis, the party seeking review must suffer "an injury in fact", to wit, the party must himself be among the injured, citing *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). As such, the environmental issue could not provide any basis for petitioners' standing. *Id.* at 1027.

A petition for rehearing and suggestion for rehearing en banc was subsequently denied.

ARGUMENT

I. THE COURT PROPERLY FOUND THAT SIMMONS HAD NO STANDING TO SEEK JUDICIAL REVIEW IN THE ACQUISITION CASE

The Seventh Circuit correctly decided that Simmons' alleged interest in job retention is not sufficiently within the zone of interests to be protected by the Interstate Commerce Act, so as to justify his standing in this proceeding. The Seventh Circuit's holding is amply supported by the decisions of this Court. This Court has repeatedly concluded that, in addition to satisfying the case or controversy requirement of Article III of the Constitution, the courts must determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Data Processing, supra*, 397 U.S. at 153.[3] The test is a guide for deciding when a "particular plaintiff should be heard to complain of a particular agency action." *Clarke, supra*, 479 U.S. at 399. As the *Clarke* court held:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the *plaintiff's interests are so marginally related to or inconsistent with the purposes*

[3] This test is a useful in applying section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. §702, which confers standing on a person "*Aggrieved* by agency action *within the meaning of a relevant statute*" (emphasis added). The APA is not intended to allow suit by every person suffering injury in fact. *Clarke, supra* 479 U.S. at 395. The complainant must not only be "adversely affected or aggrieved" (i.e., injured in fact), but must also come within the zone of interests to be protected by the relevant statute. *Id.*

> *implicit in the statute* that it cannot reasonably be assumed that Congress intended to permit suit.

Id. at 399 (emphasis added). The test is meant to "exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Id.* at 397 n.12.

The overall scheme of the Interstate Commerce Act is to stimulate change and improvement of the national rail system through transactions that increase its overall efficiency, while providing rail employee labor protection against resulting dislocations. Simmons' interest in job retention by preservation of the *status quo* is inconsistent with the statutory scheme and would frustrate rather than further the purposes of the Act.

The Interstate Commerce Act contains fifteen rail transportation policy objectives, only one of which addresses rail labor interests. It simply encourages "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. 10101a(12). Thus, as the Seventh Circuit properly determined, the Act was not meant "to protect a rail employee's interest in retaining his job." 909 F.2d at 190.

Nor does the Act contain any substantive provisions that would support job retention. Rather, the Act provides for either mandatory or permissive imposition of labor protective conditions in order to compensate employees who may be affected by a particular transaction. For example, Section 10901(e) permits, but does not require, certain protective conditions to be imposed in rail line sales. See *Pittsburgh & Lake Erie Ry. Co. v. RLEA*, 491 U.S. ____, 109 S.Ct. 2584, 2591 (1989). Similarly, Section 11347 requires the imposition of labor protective conditions in rail consolidations. The balance of the statutes cited by Simmons similarly require or permit imposition

of these protective conditions. These conditions provide a *financial/compensatory* remedy for employees affected by an ICC-authorized transaction. In providing for them, Congress meant to facilitate these transactions, not prevent them so that rail employees may *retain* their jobs.

Simmons attempts to confuse the concepts of "job retention" and "labor protective conditions." Pursuant to Congressional direction, the Commission has developed a single set of standard labor protective conditions, which it has modified slightly to fit the circumstances of particular types of transactions. For mergers and consolidations, the applicable protective conditions are those adopted in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); for abandonments, the conditions are those adopted in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979); for trackage rights transactions, they are those adopted in *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), *modified sub nom., Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom., RLEA v. United States*, 675 F.2d 1248 (D.C. Cir., 1982). It is these labor protective conditions, and the enforcement thereof, which are within the zone of interests protected by the Interstate Commerce Act. No such zone of interests exists for the retention of rail labor jobs per se.

In line sale exemptions such as the case at bar, the Commission, in its discretionary authority, has determined that labor protective conditions will only be imposed on line sale transactions where "extraordinary circumstances" are shown. 1 I.C.C. 2d 810, 815, *Aff'd sub nom., Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). At no point whatsoever in this proceeding, either

before the Commission or the Seventh Circuit, has Simmons made any attempt to argue or show the existence of "extraordinary circumstances" justifying imposition of labor protective conditions. Thus, Simmons has not set forth any relevant labor issue which would justify his standing to petition the Seventh Circuit for review of the Interstate Commerce Commission order.

Simmons claims that Section 10328(a) of the Interstate Commerce Act allows railroad employees to obtain judicial review of *any* Commission decision. But Section 10328(a) merely confers a right to *intervene* in a proceeding "that *affects* those employees" (emphasis added). While it assures rail labor of party status at the agency level, it does not thereby give rail labor standing to initiate judicial review of any and all ICC decisions. Simmons also cites *Brotherhood of Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 529 (1947) in support of his position. However, *Railroad Trainmen* merely relied upon Section 10328(a) in finding a right by rail labor to *intervene* in a suit to *enforce* an ICC order, i.e., a judicial proceeding which "arose" under the Act. That ruling most certainly does not extend to proceedings for review of any agency order brought under the Hobbs Act.

If mere party status below were sufficient to obtain judicial review, the zone of interest test would be thoroughly undermined. The Hobbs Act limits the right to seek judicial review of an agency's decision to those who were parties before the agency. *See* 28 U.S.C. §§2323, 2348; *Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir. 1983). But it does not relieve courts from the need to address *who* may seek judicial review of *which* agency order(s). *See e.g. American Legal Foundation v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987). Participation in an agency proceeding does not, in and of itself, satisfy *judicial* standing requirements, *id.* at 89, since parties need not satisfy the

zone of interest test to have appeared before the Commission. Here, Simmons did not satisfy that zone of interests test.

Finally, Simmons attempts to latch onto the interests of third party shippers and the "public" in order to justify his standing to seek judicial review. However, it is well-established that a party cannot rest on the rights of third parties to establish standing. *See Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Nor can he argue the public interest unless he has established standing in his own right. *See Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).

An asserted right to have the government act in accordance with law is not sufficient alone to confer standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984). Nor is an interest in governmental efficiency that is no greater than that of the ordinary citizen/taxpayer. *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1048 (D.C. Cir. 1989). Consequently, Simmons cannot achieve standing as a private individual by combining his Article III injury with an asserted public interest. *Peoples Gas, Light & Coke Co. v. USPS*, 658 F.2d 1182, 1198 (7th Cir. 1981).

In sum, the Seventh Circuit's decision does not conflict with any decisions of this Court or other Circuit Courts of Appeal. And, the zone of interest test was properly applied. The only substantive rights which Congress has conferred on labor are compensatory in nature, and are intended as the appropriate remedy for the job displacement or wage losses resulting from carrier line sales. Permitting rail labor to prevent a line sale on the grounds that employees of the selling carrier have the right to retain their jobs on the line at issue, with their employing carrier, in perpetuity, would be inconsistent with the Interstate Commerce Act.

II. THE COURT PROPERLY FOUND THAT PETITIONERS HAD NO STANDING TO SEEK JUDICIAL REVIEW IN THE ABANDONMENT CASE

The Seventh Circuit's dismissal of the petition in the abandonment case, for lack of standing, is thoroughly in accord with the facts of this case and well settled precedent. In order for a party to have standing to seek judicial review of an agency order, three requirements must be met: (1) the party must suffer actual or threatened injury-in-fact from the agency's conduct; (2) the injury must be traceable to the challenged conduct and (3) the injury must be one that can be redressed by the Court through a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *City of Evanston v. Regional Transportation Authority*, 825 F. 2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988). Petitioners McLay and Edenfruit did not satisfy these requirements.

As the Seventh Circuit correctly pointed out, the most that it could do in this proceeding was to overturn the Commission's order which had refused to revoke the abandonment. It could not order C&NW to repair the severed track on the Chemung-Poplar Grove line so as to restore the serviceability of that line. As such, McLay's and Edenfruit's claim that they would suffer competitive injury by not being able to ship on the abandoned line would not be redressed in consequence of the Court's decision. They failed to satisfy the third prong of the standing test under Article III.[4]

[4] It must also be pointed out the McLay and Edenfruit could hardly be considered rail shippers. The record before the Commission and the Seventh Circuit revealed that McLay had not shipped by rail since the 1970's and had shipped exclusively via

(Footnote continued on following page)

Petitioners claim that the Seventh Circuit's decision is inconsistent with this Court's holding in *Chicago and North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311 (1981). Although it is unclear from the petition exactly why petitioners think *Kalo* is applicable here, the fact is that *Kalo* has absolutely no applicability to the instant case. In *Kalo*, a mud slide had severely damaged a rail line, thereby cutting off *all* rail service to the shipper. Thereafter, the C&NW sought and received Commission approval for abandonment of the line. The shipper filed suit in state court seeking damages for the abandonment. This Court held that a state court action for damages relating to an abandonment was preempted by the Interstate Commerce Act. The holding in *Kalo* has nothing whatsoever to do with the issues in case at bar. Furthermore, *Kalo* does not even purport to deal with the circumstance, as here, in which an industry continues to have available direct rail service via a second, alternate line.

There is *nothing* in the Interstate Commerce Act which requires a carrier to route traffic over a particular rail

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[4] *continued*

trucks since that time. As to Edenfruit, the record revealed that it had shipped no cars in 1985, one car in 1986, and no cars in 1987 or 1988. Furthermore, those petitioners did not lose rail service by virtue of the abandonment. Assuming they ever decided to ship by rail (which is unlikely in view of their historical pattern), that service continued to be available via C&NW's western route to Poplar Grove. Thus, it is arguable that petitioners Edenfruit and McLay did not even satisfy the first prong of the three part test, in that they did not establish any injury-in-fact. However, the Seventh Circuit held that an allegation of competitive injury was sufficient to satisfy the first prong of the standing test.

The Court also noted that the "injury" claimed by petitioners was not traceable to the Commission abandonment order in view of the fact that the line had been severed.

line within its system. The Commission has consistently held that internal routing of rail traffic is a matter for managerial discretion. *People of Illinois v. I.C.C.*, 698 F.2d 868, 873 (7th Cir. 1983). Indeed, even if there had been *no* derailment on the Chemung-Poplar Grove line, C&NW could not be forced to route traffic over that line, so long as service was being provided to Poplar Grove shippers. Thus, there is simply no redressable injury traceable to the Commission's action in this proceeding, and the petitioners' claimed "injury" could not be redressed through the Seventh Circuit's decision. Plainly stated, the Interstate Commerce Act does not require a carrier to provide two alternate routes to shippers. Reversal of the abandonment decision would not and could not result in the restoration of rail service over the Chemung-Poplar Grove line.

The Seventh Circuit also concluded that the environmental issues raised by petitioners were insufficient to confer standing. The petitioners claimed that the Commission had improperly failed to consider any environmental impact which might occur to the adjoining Poplar Grove-South Beloit line by virtue of C&NW's abandonment of the Chemung-Poplar Grove line. However, the petitioners did not allege any specific environmental damage which might occur, nor did they allege how *they* would be injured through the Commission's action.

Under the first prong of the Article III standing test, it is well settled that the party seeking review must himself be among the injured. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). None of the petitioners, McLay, Edenfruit or Simmons satisfied this test.

Finally, the Seventh Circuit also concluded that Simmons' claim of possible loss of jobs by virtue of the abandonment was insufficient to satisfy the zone of interest

(prudential limitation) requirements of the *Data Processing* and *Clarke* decisions.

In the proceedings below, the Commission had imposed labor protective conditions pursuant to *Oregon Short Line R. Co.-Abandonment-Goshen*, 360 I.C.C. 91 (1979), which are the standard labor protective conditions imposed in abandonment proceedings to compensate any employees adversely impacted by an abandonment. Simmons did not challenge these labor protective conditions or offer any reason why they were insufficient in this proceeding. Indeed, no labor issue whatsoever was raised before the Commission.

On petition for judicial review before the Seventh Circuit, petitioners similarly did not raise *any* labor issues until counsel was pressed by the Court at oral argument as to exactly what injury rail labor allegedly suffered in this proceeding. At oral argument, counsel for petitioners alleged a possible loss of jobs. However, even if we assume, *arguendo*, a possible loss of jobs, notwithstanding the fact that no rail service was provided over this line (and consequently no jobs could have been lost), the Seventh Circuit correctly held that job retention does not satisfy the zone of interest test under *Data Processing* and *Clarke*.

The Interstate Commerce Act requires that the Commission reduce regulatory barriers to exit from the industry. 49 U.S.C. §10101a(7) Further, when the Commission authorizes an abandonment, Congress has mandated that the authorization contain provisions to protect the interest of employees. 49 U.S.C. §10903(b)(2) Thus, the labor protective conditions which have been embodied in *Oregon Short Line, supra*, are the substantive rights which Congress has conferred on rail labor. These rights are compensatory in nature and are intended as the appropriate

remedy for any job displacement or wage losses resulting from carrier abandonments. The necessary corollary is that rail employees do not have a protected interest in retaining their jobs.

Permitting rail labor to prevent a rail line abandonment on the grounds that the employees of the carrier have the right to retain their jobs, in perpetuity, is thoroughly inconsistent with the statutory scheme of the Interstate Commerce Act. Such a conclusion would be particularly inappropriate here where there are no jobs to be lost since the line was not providing any service. Accordingly, the Seventh Circuit's decision was entirely correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 15, 1991

APPENDIX A

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

Service Date
[Docket No. AB-1 October 14, 1988
(Sub-No. 221X)]

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT EXEMPTION—BOONE COUNTY, IL

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon its 6.5-mile line of railroad between milepost 67.5 near Chemung to milepost 74 near Poplar Grove in Boone County, IL.

Applicant has certified (1) that no local traffic has moved over the line for at least 2 years, (2) that all overhead traffic previously routed over this line has been rerouted and (3) that no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective November 13, 1988 (unless stayed pending reconsideration). Petitions to stay regarding matters that do not involve environmental issues[1] and formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2)[2] must be filed by October 24, 1988, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by November 3, 1988 with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

A copy of any petition filed with the Commission should be sent to applicant's representative:

Myles L. Tobin
Chicago and North Western
Transportation Company
One North Western Center
Chicago, IL 60606

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, resulting from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by October 19, 1988. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7316.

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: October 4, 1988

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee
Secretary

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[1] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 4. I.C.C.2d 400 (1988).

[2] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the FEDERAL REGISTER on December 22, 1987 (52 FR 48440-48446).

No. 90-959

IN THE

Supreme Court of the United States

October Term, 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and CHICAGO-CHEMUNG RAILROAD CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF, AND REPLY BRIEF TO BRIEFS IN OPPOSITION

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LIST OF PARTIES

There are no additions to the list of parties set forth in the petition for a writ of certiorari. Rule 29.1.

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IN THE

Supreme Court of the United States

October Term, 1990

No. 90-959

PATRICK W. SIMMONS, McLAY GRAIN COMPANY, and EDENFRUIT PRODUCTS COMPANY

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v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF, AND REPLY BRIEF TO BRIEFS IN OPPOSITION

Petitioners submit this (1) Supplemental Brief, and (2) Reply brief to Briefs in Opposition, filed by the Federal Respondents (Govt. Br.), and jointly by respondents Chicago & North Western Transportation Company and Chicago-Chemung Railroad Corporation (C&NW Br.).

1. **Supplemental Brief.** Subsequent to the filing of the Petition, the Interstate Commerce Commission (ICC) on January 23, 1991, issued a decision in an abandonment exemption proceeding, in which oral public hearings were held by the agency at Reno, Nevada. ICC Docket No. AB-12 (Sub-

No. 124X), *Southern Pacific Transportation Company — Abandonment Exemption — In Mineral County, NV,* decided January 16, 1991 (not printed). (*SP Abandonment-Nevada*). The Nevada Legislative Director for the United Transportation Union (UTU) filed a protest and testified at the hearing. However, in its decision served January 23, 1991, the ICC ruled that the UTU lacks standing to oppose an abandoment on the merits, citing the decision below:

> "Moreover, UTU-Local lacks standing to oppose the abandonment on the merits. *See Simmons v. ICC,* 900 F.2d 1023, *reh'g* and *reh'g en banc* denied, 909 F.2d 186 (7th Cir. 1990)."

SP Abandonment-Nevada at p. 7, n.17. Ten copies of the ICC's decision have been lodged with the Clerk.

The ICC has made the instant proceeding the basis for denying UTU participation in rail abandonment cases. This further demonstrates the importance of the proceeding to the day-to-day administration of the Interstate Commerce Act.

1. **Reply Brief.** Certain arguments have been raised by the Govt. for the first time. The Govt. asserts that petitioner UTU contends the court of appeals erred in holding that the interest of rail employees in retaining their jobs is not within the zone of interests protected by the Interstate Commerce Act (Govt. Br. 8), and that UTU does not contend that a "zone" inquiry is unnecessary here. (Govt. Br. 9).

UTU's position is that the issue below should have been whether UTU's interest in employee job protection is so "marginally related" or "inconsistent" with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit review. (Pet. 16). The statutory provisions for deciding the merits of both line spin-offs (49 U.S.C. 10901), and line abandonments (49 U.S.C. 10903),

speak only of "public convenience and necessity." The "zone of interests" inquiry is "arguably" whether the interest is to be protected or "regulated" by the involved statute.[1] The employment interest of railroad workers is part of the "public convenience and necessity." *I.C.C. v. Railway Labor Ass'n.*, 315 U.S. 373, 376-78 (1942); *United States v. Lowden*, 308 U.S. 225 (1939). Indeed, the ICC itself, after Congress in 1958 gave the agency added jurisdiction over passenger train abandonments, acknowledged that the impact upon rail employment is an issue on the merits of the "public convenience and necessity." *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59, 74 (1959):

> We agree with the employees that, in determining whether or not operation of the train is required by the public convenience and necessity, consideratаion should be given to the probable effect which discontinuance of the train will have upon employees. That the term "public convenience and necessity is broad enough to embrace consideration of the interests of employees is clear from the decision of the Supreme Court in *Interstate Commerce Commission v. Ry. Labor Executives' Assn.* 315 U.S. 373.

See also: Illinois Commerce Commission v. United States, 347 F.Supp. 1217, 1219-20 (N.D. Ill. 1971) (three judge).[2]

In short, the interest of rail employees is not so "marginally related" or "inconsistent" with the statutory purpose, to

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[1]Somehow, the court below and the Govt. have ignored the "arguably" or "regulated" language of *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970) and *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396, 397 (1987).

[2]Until 1975, ICC orders were reviewed by three-judge district courts, with direct appeal to this Court. 88 Stat. 1917-18.

infer Congress intended to deny standing to rail employees, in spin-offs and abandonment cases. Transportation Act of 1920, and the many thousands of administrative proceedings and appeals to the courts thereafter, have long since settled any "zone of interests" test for railway labor in the area of line abandonments, mergers, line sales and the like. 909 F.2d at 191. (Pet. 13a).

Decisions of Other Circuits. The Govt. asserts that only decisions by the Seventh Circuit are listed in support of the contention by dissenting Judge Cudahy that this is the first known instance where standing has been denied to railroad labor in proceedings in which job elimination is a consideration. (Govt. Br. 15-16 & n.10).

Court decisions involving railway labor suits to set aside ICC orders on the merits are numerous. Two fairly recent opinions in the D.C. Circuit come to mind: *Simmons v. ICC*, 716 F.2d 40 (1983), and *Simmons v. ICC*, 757 F.2d 296 (1985). *See also: McGinness v. ICC*, 662 F.2d 853 (D.C. Cir. 1981); *Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982); *Black v. ICC*, 762 F.2d 106 (D.C. Cir. 1985); *Simmons v. ICC*, 829 F.2d 150 (D.C. Cir. 1987); *ICG Concerned Workers Ass'n v. U.S.*, 888 F.2d 1455 (D.C. Cir. 1989); *Black v. ICC*, 837 F.2d 1175 (D.C. Cir. 1988).

Two decisions in the Eighth Circuit are: *Winter v. ICC*, 851 F.2d 1056 (8th Cir. 1988), *cert. den.* 488 U.S. 925; *Brotherhood of Ry. Carmen (Div. of TCU) v. ICC*, 917 F.2d 1136 (8th Cir. 1990). *See also: Sludden v. United States*, 211 F.Supp. 150 (M.D. Pa. 1962) (three judge).

Shipper Injury. The Govt. argues that the court of appeals correctly concluded that reversal of the ICC's abandonment decision would not remedy the alleged injury and restore service, and that such fact-bound ruling does not merit review.

(Govt. Br. 17). The Govt. has misapprehended our contention, and would ignore the real world as well. The *Abandonment* of the middle Chemung-Poplar Grove segment, together with *Acquisition* of the eastern Harvard-Chemung segment, puts the western Poplar Grove-So.Beloit segment at risk. This was recognized by two of the five ICC commissioners. (Pet. 61a-62a, 72a-73a). Indeed, these shipper petitioners (along with Dean Foods Company) were participants in the *Acquisition* proceeding (Pet. 5), and petitioner McLay Grain Company sought to intervene in the *Acquisition* case below. (Pet. 27a-28a).

C&NW Brief. The C&NW brief purports to deal with the merits of the ICC's decisions, and contains many misstatements, which need not be answered at this point. We point out that the court of appeals, contrary to C&NW's brief (C&NW Br. 6, 11), did *not* rule that substantial evidence supported the ICC's decisions. 909 F.2d at 189 (Pet. 7a); 900 F.2d at 1026 (Pet. 23a).

Respectfully submitted,

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February 25, 1991

No. 90-959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY,
and EDENFRUIT PRODUCTS COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
and CHICAGO-CHEMUNG RAILROAD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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PATRICK W. SIMMONS, McLAY GRAIN COMPANY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

This brief *amicus curiae* is being filed with the written consents of the parties, which have been filed with the Clerk of this Court pursuant to Rule 37.2 of the Rules of this Court. The Railway Labor Executives' Association ("RLEA") urges this Court to grant the petition for a writ of certiorari requested by petitioners to review the decisions by the United States Court of Appeals for the Seventh Circuit in two separate cases.

INTEREST OF *AMICUS CURIAE*

Amicus RLEA is a voluntary, unincorporated association of the chief executive officers of seventeen national and international standard railway labor organizations representing, together with the United Transportation Union ("UTU"), virtually all organized railroad employees in the United States.[1] RLEA has represented the interests of its affiliated organizations before this Court, the Congress and state and federal courts and administrative agencies, including the Interstate Commerce Commission ("ICC" or "Commission"), since its founding in May, 1926. It has presented rail labor's position on matters which affect the interests of railroad employees generally, including, as is relevant to this case, their right to challenge ICC orders approving or permitting transactions which could deprive employees of their employment.

RLEA has been actively involved in appearances before the Congress[2] and this Court[3] as the recognized representative and spokesman for the railroad employees throughout this country on matters in which they share a common interest.

Since its formation the RLEA also has been the spokesman for its affiliated organizations as the duly designated representatives of railroad employees in those matters which generally affect their interests as such representatives.

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[1] The organizations affiliated with the RLEA through the membership of their chief executives are listed in Appendix A to this brief. The chief executive of UTU is not a member of RLEA.

[2] *See e.g., Hearings on S. 1946, Before the Senate Committee on Commerce, Science and Transportation*, 96th Cong., 1st Sess. at 536 (1979).

[3] *See e.g., American Trucking Associations, Inc. v. United States*, 355 U.S. 141, 144, 146-147 (1957); *United States v. Lowden*, 308 U.S. 225, 234, 235-36 (1939).

In the decisions subject to the petition in this case, the Seventh Circuit held that although the employees and their representatives[4] met the requirements of Article III of the United States Constitution for standing to challenge an order of the ICC,[5] neither the employees nor their representatives came within the "zone of interests" standing test set forth in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). (Pet. App. at 10a.) These decisions of the Seventh Circuit affect all represented employees and all statutory representatives in the railroad industry. These decisions eliminate the ability of rail unions to protect the livelihoods of the workers they represent by prohibiting the employee representatives from appealing to the courts to challenge ill-conceived or ill-considered decisions of the Interstate Commerce Commission.

The ability of the representatives of railroad employees to challenge faulty ICC decisions is of more importance today than ever before in light of shrinking job opportunities in the railroad industry and the decisions of the Commission which, beginning in 1982, have sought to deprive employees of the protections Congress intended for their benefit and have arrogated to that agency authority over the statutory and contract rights of railroad employees. *See e.g. Norfolk & Western Ry. v. ATDA*

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[4] Petitioner Simmons, Legislative Director of the UTU for the State of Illinois, was treated by the court below as appearing on behalf of the UTU and the affected employees represented by that union. *See* Appendix to Petition [hereinafter, "Pet. App."] at 3a-4a n.1. Accordingly, petitioner will be considered as the UTU in this *amicus* brief.

[5] The Article III requirements were articulated by the Seventh Circuit as "(1) the party must personally have suffered an actual or threatened injury caused by the defendants allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision." Pet. App. at 8a.

[hereinafter, "*N&W v. ATDA*"], Sup. Ct. Nos. 89-1027 and 89-1028 (argued December 3, 1990).

As this Court long-ago recognized (*United States v. Lowden*, *supra*, 308 U.S. at 234):

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

And again (308 U.S. at 235-36):

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

The ICC's course since 1982 has been one of steady and progressive restriction of the rights and benefits which Congress has provided railroad employees in recognition of their value to the maintenance of an adequate and efficient national rail transportation system; a value noted by this Court in *Lowden*, *supra*. The ICC has reached the point of challenging for the first time an employee representative's right to appeal from a Commission order approving, or permitting by exemption from its provisions, a transaction under the Interstate Commerce Act which would cause loss of employment.[6]

[6] While the ICC in the past never questioned the employee representative's right to appear and oppose the transaction before the Commission and first raised such a challenge in the Seventh Circuit, it very recently cited the Seventh Circuit's decisions as au-

Since the Seventh Circuit's deprivation of the right of railroad employees or their representatives to challenge orders of the ICC in the courts is important to all railroad employees and to their representatives, RLEA submits this brief in support of the petition.

SUMMARY OF ARGUMENT

This case presents for this Court's consideration companion decisions by the Seventh Circuit that conflict with decisions by this Court, an express statutory right of intervention, and all recognized norms of standing. This Court should review these decisions for several reasons, not the least of which is the need for this Court to exercise supervisory power over the federal courts to assure that the courts do not unconscionably deny access to the judiciary. Moreover, this Court should grant immediate review of the decisions of the Seventh Circuit as a step toward elimination of the chaos in railroad labor relations which widens and deepens with each successive decision of the ICC. Since 1983 these decisions have progressively eroded the contractual and statutory rights of employees. A partial history of these decisions was brought to the attention of this Court in *N&W v. ATDA*, *supra*. The ICC, within the past month, has used the decisions which are the subject of the instant petition as authority for barring employee representatives from challenging the merits of rail line abandonment applications pending *before the ICC*. Given the effects of these decisions, there are few rights with which the ICC would leave the employees. As the ICC now views the law, railroad employees are prohibited from challenging applications on their merits before the Commission (*So. Pac.*

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thority for denying an employee representative the right to challenge the *merits* of a proposed abandonment of a line of railroad pending *before the Commission. Southern Pacific Transportation Company—Abandonment Exemption—in Mineral County, NV*, Docket No. AB-12 (Sub-No. 124X), served January 23, 1991 (not printed).

Trans., supra), or the courts (Seventh Circuit decisions); and, following ICC approval of such applications, 49 U.S.C. §§ 11341(a) and 11347 authorize the modification or elimination of employees' contract and Railway Labor Act rights as "necessary" to permit the railroad to implement the approval orders. Additionaly, the ICC asserts that 49 U.S.C. § 11341(a) bars employees from recourse to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, to prevent the violation or loss of those rights. *N&W v. ATDA*, Federal Resp. Br.; 6 I.C.C.2d 716.

The decisions of the Seventh Circuit subject to the petition in this case are unprecedented and contravene decisions of this Court, explicit statutory enactments and the history of congressional policy in its regulation of railroad transportation during most of this century.

The decisions contravene this Court's rulings in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) and *American Trucking Associations, Inc. v. United States*, 355 U.S. 141 (1957); misapply the "zone of interests" standard as announced in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), and recently clarified in *Clarke v. Securities Industry Ass'n*, 479 U.S. 338 (1987); and, ignore the statement of this Court in *Warth v. Seldin*, 422 U.S. 490 (1975), that the test does not apply where the party has a statutory right of intervention.

The decisions flout the will of Congress expressed in 49 U.S.C. § 10328(a) granting employee representatives an unconditional right of intervention before the Commission and the courts with all of the rights of a full party, including the right of appeal. The Congress has often amended the Interstate Commerce Act since this Court's decisions in *B&O* and *ATA*, but has not substantively amended Section 10328(a).

Even if the "zone of interest" test were applicable, railroad employee representatives would satisfy it. From

the enactment of the Emergency Railroad Transportation Act of 1933,[7] through the Transportation Act of 1940,[8] to the Railroad Revitalization and Regulatory Reform Act of 1976[9] and the Staggers Rail Act of 1980,[10] the Congress has gone to great lengths to demonstrate its concern for and to protect the interests of railroad employees by protecting those interests as a part of the public interest generally and as essential to an adequate and efficient national rail transportation policy, as recognized by this Court in *United States v. Lowden*, 308 U.S. 225 (1939).

ARGUMENT

I. THE UNPRECEDENTED DECISIONS BY THE SEVENTH CIRCUIT ARE IN CONTRAVENTION OF DECISIONS OF THIS COURT AND THE INTENT OF CONGRESS AS PLAINLY EXPRESSED IN THE INTERSTATE COMMERCE ACT, INCLUDING ITS HISTORICAL CONCERN FOR AND PROTECTION OF THE INTERESTS OF RAILROAD EMPLOYEES

The RLEA respectfully submits that the opening statement of Judge Cudahy's opinion dissenting from denial of rehearing *en banc* is factually and legally accurate (Pet. App. at 13a; footnote omitted):

> This is a decision of exceptional importance since it is the first known instance in a very long history of employee participation where standing has been denied to railroad labor in a proceeding in which job elimination is a consideration. There have, of course, been many thousands of administrative proceedings and appeals to the courts involving line abandonments, mergers, line sales and the like in which em-

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[7] 48 Stat. 211.

[8] 54 Stat. 899.

[9] 90 Stat. 31.

[10] 94 Stat. 1895.

> ployee representatives have participated without question both in the agency and in court. To assert that job protection lies outside the "zone of interests" arguably protected by the ICA seems to me to ignore the history of railroad regulation for most of the twentieth century.

The Congress expressly granted representatives of employees of railroads the right to intervene and be heard in "any proceeding arising under" the Interstate Commerce Act.[11] In 1947 this Court heard an appeal by the Brotherhood of Railroad Trainmen ("BRT")[12] from an order of the United States District Court for the Northern District of Illinois. That court had denied BRT's motion to intervene in a suit brought by one group of railroads against another group of railroads to enjoin an alleged violation of an operating condition attached by the ICC to its order approving the purchase of all stock in one railroad by another and the lease of a third railroad. BRT claimed a right of intervention in the court proceeding by virtue of then Section 17(11) of the Interstate Commerce Act (now 49 U.S.C. § 10328(a)). Certain railroads opposed BRT's intervention on the ground that Section 17(11) applied only to intervention before the Commission. The District Court denied BRT's motion without opinion. This Court in a unanimous decision held that Section 17(11) gave BRT, as a duly designated representative of employees of a railroad involved in the suit, an absolute right of intervention in that suit as it arose under the Interstate Commerce Act because "[t]he right of intervention granted to such a representative by § 17(11) applies to a court proceeding . . . [as] the plain language of § 17(11) extends its reach to '*any* proceeding

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[11] The wording quoted is that of the original language of 49 U.S.C. § 17(11) before it was recodified without change in substance in 1978 by Pub. L. No. 95-473, 92 Stat. 1337. The recodified language reads (49 U.S.C. 10328(a)): "in a proceeding arising under" the Act.

[12] BRT is now merged into UTU.

arising under this Act.'" *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 526 (1947).

Ten years later a question again arose as to the standing of a representative of rail labor. At that time it was the RLEA whose standing was questioned in an appeal from a District Court order which had upheld an ICC ruling in separate cases brought by RLEA and the American Trucking Associations, Inc. ("ATA"). RLEA and ATA had filed separate appeals with the District Court seeking to overturn the ICC's refusal to place operating restrictions on a railroad's motor carrier subsidiary. When this Court noted jurisdiction it invited RLEA to discuss the issue of its standing to sue. At the outset of its opinion in the *ATA* case this Court said (355 U.S. at 144) (footnotes omitted):

> At the time we noted probable jurisdiction of the appeals, 352 U.S. 816 (1956), counsel in No. 8 were invited to discuss the issue of appellant's standing to sue. None of the parties now question that standing, and our examination of § 17(11) and § 205(h) of the Act leads us to conclude that appellants may properly bring this action. *See Brotherhood of R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, (1947).

The decision of the Seventh Circuit directly contravenes the explicit unanimous decisions of this Court in the above cited cases for the right of intervention established by 49 U.S.C. § 10328(a) is not a conditional right. The right of intervention confers upon the intervenor the full rights of a party to the proceeding, including the right to challenge the merits of a carrier's application and to appeal from an adverse decision. *B&O*, 331 U.S. at 524, citing *Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 508 (1941). RLEA, its affiliated union's and UTU have often intervened as full parties to merger and other proceedings before the ICC and opposed such

transactions on their *merits*,[13] and have often sought to have appellate courts set aside ICC orders approving the transactions which they opposed.[14] The decisions rendered by the Seventh Circuit would have, in many instances, deprived these statutory representatives of the right to protect the interests of employees directly impacted by ICC decisions from appealing those decisions to the courts.

The decisions also flout the clearly expressed will of the Congress as embodied in the Interstate Commerce Act. That Act has been amended extensively since this Court's decisions in the cited cases but the provisions of 49 U.S.C. § 17(11), now recodified as 49 U.S.C. § 10328(a), were not substantially changed. Presumably the Congress knew of and understood this Court's rulings on the meaning and effect of then Section 17(11) and adopted them. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

The Seventh Circuit misapplied the "zone of interests" standard first addressed by this Court in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) and clarified in *Clarke v. Securities Industry Ass'n*, 479 U.S. 338 (1987). In neither of those cases did the party whose standing was challenged have the benefit of a statute which gave it an absolute right to intervene in any action arising under the governing statute, as is the case with the petitioner here. 49 U.S.C. § 10328(a). This Court's decision in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), clearly indicates that where such a statutory right of intervention exists prudential considerations do not affect standing.

None of the parties in the cases relied upon by the Seventh Circuit had the benefit of an existing Supreme Court decision recognizing their standing; but here, the

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[13] *See e.g., Great Northern Pac. R.R.—Merger—Great Northern R.R.*, 328 I.C.C. 460 (1966).

[14] *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169 (1961).

railroad employee representatives and their spokesmen, such as the RLEA, have been recognized by this Court as having the right to bring suit in their own names to appeal from and challenge an order of the Commission, as the petitioner does here. *American Trucking Associations, Inc. v. United States, supra,* 355 U.S. at 144.

Moreover, the "zone of interests" test utilized by the Seventh Circuit has never been applied to a party to whom Congress has granted an explicit right of intervention before the agency involved and the courts. *See Warth, supra.* To conclude, as the Seventh Circuit did here, that a party with such an express statutory right may not appeal an agency decision which would have an adverse impact upon it or those it represents contradicts the clear will of Congress and the decisions of this Court; and, defies common sense.

In any event, railroad employee representatives would be well within the "zone of interests" of the Interstate Commerce Act even if that prudential test were applicable to them. The Congress has gone to great lengths to ensure the protection of the interests of employees in all legislation affecting the railroad industry. In addition to providing employees with an absolute right of intervention in any proceeding arising under the Interstate Commerce Act, the Congress has required consideration of their specific interests in weighing the public interest considerations of a railroad merger, lease, trackage rights or stock control application. 49 U.S.C. § 11344(b)(1)(D).[15] In 1976 when Congress enacted the Railroad Revitalization and Regulatory Reform Act ("4R Act"), as its first step

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[15] At least one major merger application was denied, even though "appropriately conditioned", because of its effects upon the interests of employees and rail competition. *Great Northern Pac., supra,* 328 I.C.C. at 528. The merger was later approved by the Commission following further hearings and the execution of employee protection agreements which addressed the public interest considerations and made the merger consistent with the public interest. 331 I.C.C. 228 (1967).

toward railroad industry deregulation, it amended the Interstate Commerce Act to require increased employee protection in railroad consolidation cases (4R Act § 402 (a), 90 Stat. 62; 49 U.S.C. § 11347) and abandonment cases (4R Act § 802, 90 Stat. 127-28; 49 U.S.C. § 10903) and made mandatory the imposition of such protection in abandonments, as was the case in mergers.

Indeed, from the enactment of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, through the passage of the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, the Congress has been most solicitous and protective of the welfare of railroad employees. It is simply inconceivable that given the statutory evidence confronting it, the Seventh Circuit could decide that railroad employees and their representatives do not come within the "zone of interests" of the Interstate Commerce Act and therefore cannot appeal from an ICC order that impacts them adversely.

As explained above, rail employees have historically enjoyed the right to challenge, first before the Commission and then, if necessary, before the courts, the appropriateness of a rail carrier's economic proposal that may effect their jobs. This "right" arises from the fact that rail employees are a part of the "public interest" that the Interstate Commerce Act was designed to protect, as well as from the specific provisions of that Act that deal expressly with employee interests. The decisions by the Seventh Circuit ignore rail labor's public interest role, and instead, limit the right of rail employees to participate in ICC and subsequent review proceedings to those aspects of the ICC's consideration which deal with the imposition of conditions *after* the Commission has considered and decided the "public interest." The validity of this bifurcation of rail labor's historical and statutory right to participate in ICC-related proceedings which so directly affect employees, presents an issue that is crucial to rail employees. However, this issue has been de-

cided in such an obviously irrational manner by the Seventh Circuit, that this Court, essentially as an exercise of its supervisory power over the federal courts, should review these decisions.

II. THIS COURT SHOULD REVIEW THE DECISIONS BY THE SEVENTH CIRCUIT BECAUSE THOSE DECISIONS THREATEN TO DEPRIVE RAIL EMPLOYEES OF ACCESS TO THE FEDERAL COURTS TO CHALLENGE ICC ACTIONS THAT ARE CONTRARY TO THE COMMANDS OF THE ICA AND DEPRIVE EMPLOYEES OF EMPLOYMENT

An additional compelling reason for this Court to grant certiorari in this case is the need for restoration of order from the deepening chaos created by the Commission in railroad labor relations; a situation which worsens with each successive ICC decision. In *N&W v. ATDA*, *supra*, the Commission had held that Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), authorized it to modify existing collective bargaining rights and existing collective bargaining agreement rights of employees. As the Commission held in its *Maine Central* decision, so heavily relied upon in that consolidated case,[16] it "is that [ICC] order, not R[ailway] L[abor] A[ct] or WJPA [a collectively bargained employee protection agreement], that is to govern employee-management relations in connection with the approved transaction." [17] Yet in the instant case, according to the Seventh Circuit, as the ICC successfully argued to that court, employee representatives have no standing to challenge an ICC order which would result

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[16] *Maine Ceneral R.R.—Exemption from 49 U.S.C. 11342 and and 11343*, Finance Docket No. 30522 (September 16, 1985) (not printed), *aff'd per curiam sub nom. Railway Labor Executives' Ass'n v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (table).

[17] *See* Brief for Union Respondents in *N&W v. ATDA*, Nos. 89-1027 and 89-1028, pp. 6-7.

in the deprivation of employment for certain employees they represent.

The ICC has now extended the effect of the Seventh Circuit's decisions by relying on them as authority to bar employee representatives in proceedings *before the ICC* from opposing railroad line abandonments on their merits. *Southern Pacific Transportation Co.—Abandonment Exemption—in Mineral County, NV*, Docket No. AB-12 (Sub-No. 124X), served January 23, 1991 (not printed). Abandonments and sales of lines of railroads are direct causes of job loss to employees. Indeed, while such transactions may or may not affect shippers and communities, they are economically devastating to employees as they deprive them of their employment; nothing can cause employees greater economic harm than that. To hold, as the Seventh Circuit has now held, that employees have no standing before the courts or the Commission to challenge the public interest aspects of such actions that could mean their economic devastation would be ludicrous were it not so tragic. This most recent ruling of the Commission provides graphic evidence of the chaos which pervades labor relations in the railroad industry as the direct result of the ICC's continuing intrusion upon the rights of railroad employees, an intrusion which the federal courts should review and, we submit, overrule.

The next logical, and rather obvious, step for the Commission would be to hold that although employees' statutory and contractual rights are subject to ICC rulings regarding them, the employees have no right to challenge before the Commission or the courts the merits of rulings on transactions which the carriers and the ICC assert justify the overruling of the employees' contractual and statutory rights. The employees must then hope that other courts will not agree with the Commission, as the Seventh Circuit did in this case, and will entertain rail labor's challenge to those ICC actions.

The need for immediate review by this Court of the Seventh Circuit's decision is acute given the clear indication of the ICC's intent to limit the participation of employee representatives before it to issues involving the imposition of conditions protecting employees' interest and the nature of those conditions only. The treatment of such issues by the ICC has become *pro forma*. Since 1982, the ICC has refused to impose conditions for the protection of employee interests in the exercise of its discretionary authority;[18] it imposes such conditions only when mandated to do so by statute; it considers the public interest obligation imposed by 49 U.S.C. § 11344 (b)(1)(D) to be satisfied by imposition of the minimum conditions required by 49 U.S.C. 11347;[19] and, it routinely provides specific formulae of conditions for specific types of cases, not because of the impact of that transaction on employees, but solely because of the subsection of the statute under which the carriers' application had been filed.[20]

Review of the Seventh Circuit's decision at this time is also particularly critical because of the Commission's contention that it can modify collective bargaining agreements and collective bargaining rights of employees under 49 U.S.C. § 11341(a) and its recent extension of the Seventh Circuit's decisions to cases pending before the Commission. Were that contention to be upheld by this Court in its pending consideration of *N&W v. ATDA*,

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[18] *Knox & Kane R.R.-Gettysburg R.R.-Petition for Exemption*, 366 I.C.C. 439 (1982).

[19] *Contra, Great Northern, etc., supra*, 328 I.C.C. at 528.

[20] *New York Dock Ry.—Control—Brooklyn Eastern District Term.*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) (mergers and control); *Norfolk & Western Ry.—Trackage Rights—BN*, 354 I.C.C. 732 (1978), *modified, Mendocino Coast Ry.—Lease and Operate*, 360 I.C.C. 653 (1980) (leases); and *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979) (abandonment).

supra, railroad employees would be confronted with the inability to oppose on public interest grounds transactions which would deprive them of employment and, when approved, would suffer modification or elimination of their contractual and statutory rights provided by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Such a result would thoroughly frustrate the Congress' policy in protecting the interests of railroad workers.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for certiorari, the Court should grant the petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

Railway Labor Executives' Association Member Organizations

American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
Hotel Employees and Restaurant Employees International Union;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Seafarers International Union of North America;
Sheet Metal Workers' International Association;
Transport Workers Union of America; and
Transportation•Communications International Union (TCU).